United States Court of Appeals

for the Second Circuit

APPENDIX

74-1157

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In The

United States Court of Appeals

For The Second Circuit

WILLIAM R. VAN GEMERT, ALBERT A. HENNING, EDWARD E. HOUCHINS, NATHAN PEARLMAN, ELIAS A. CHARIOTT, CHARLES K. DAVIS, ANDREAL HOLDING CORP., SAMUEL A. WEISS, IRWIN L. ISERT, JACK KIRSCHNER, CHARLES FRIEDMAN, H.MICHAEL ALBERS, ABRAHAM STERN, EDWARD KEMPLER, SIMEON A. SCHLOSS, JR., MARY JANE SCHLOSS SILVERMAN, SIMEON A. SCHLOSS, JR., and MARY JANE SILVERMAN, Trustees under the Last Will and Testament of Floretta Schloss Wile, DAVID M. BOTSFORD, MRS. SAMUEL LEMLER, LOUIS DAVIS, MRS. LEONARD C. DILL, JR., JOSEPH SCHLAGMAN, NATALIE K. WIGLER, ANN LOUISE DIAMOND, SAMUEL CHARDAVOYNE, WILLIAM M. JONES, MR. & MRS. H. DIENEMAN, MILTON HART, MARY LEVIN, FRANCES DAVIS, E. JULIAN DAVIS, ROBERT LEMLICH, ARTHUR FRISCH, MARIAN S. MITCHELL, VINCENTE J. BONNARD, HAROLD M. WHITE and MARGARET C.WHITE, MORRIS BERNSTEIN, WALTER L. EATON, ERNEST G. ANGEVINE, ABRAHAM PERCHICK, COMMITTEE FOR THE ESTATE OF MAX SCHNEIDER, an incompetent, FRANCIS H. SHOOBE, and ALBERT A. ARDITTI, GERTRUDE McNAUGHT, MRS. J. H. STEIN, JOAN S. BERMAN, J. DAVID STEIN, SARAH E. MORITZ, VIRGINIA W. STAUB, LOUIS BERGLAS, DR. JACK DIENER, DENNIS J. FINN, BERTHA J. WINER, JOANNE W. FINN and S. EDWARD MITTLER, for and in

(Continued)

UNITED STATES COURT OF APPEALS
FILED
SEP 6 1974
A. FARNER FUSARO, CLERK
SECOND CIRCUIT

behalf of themselves and for all other holders of the BOEING COMPANY 4-½% Convertible Subordinated Debentures, due July 1, 1980 who are similarly situated,

Plaintiffs-Appellants,

vs.

THE BOEING COMPANY (formerly BOEING AIRPLANE COMPANY), [redacted] CLAIRMONT L. EGTVEDT, WILLIAM M. ALLEN, EDWARD C. WELLS, JAMES E. PRINCE, LOWELL P. MICKELWAIT, W.L. CAMPBELL, ARTEMUS L. GATES, CRAWFORD H. GREENEWALT, WILLIAM G. REED, D.E. SKINNER, THOMAS R. WILCOX, JOHN O. YEASTING and GEORGE H. WEYERHAEUSER,

Defendants-Appellees.

On Appeal from Judgment of the United States District Court for the Southern District of New York.

APPELLANTS' APPENDIX

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KASS, GOODKIND, WECHSLER & GERSTEIN
Attorneys for Plaintiffs-Appellants, William R. Van Gemert, Albert A. Henning, Edward E. Houchins, Nathan Pearlman, Elias A. Chariott
122 East 42nd Street
New York, New York 10017
(212) 867-8570

NATHAN, MANNHEIMER, ASCHE, WINER & FREIDMAN
Attorneys for Plaintiffs-Appellants, Winer & Finn
230 Park Avenue
New York, New York 10017
(212) 683-1771

KASS, GOODKIND, WECHSLER & GERSTEIN
122 East 42nd Street
New York, New York 10017
(212) 867-8570

and

NATHAN, MANNHEIMER, ASCHE, WINER & FRIEDMAN
230 Park Avenue
New York, New York 10017
(212) 683-1771

and

IRVING STEINMAN
11 Park Place
New York, New York 10007
(212) 227-4448

As Attorneys for Committee for Plaintiffs-Appellants

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that of a total of 7,027,448 rights issued, 1,702,200 rights were traded between July 16 and 28, 1958; as for the stockholders numbering about 50,00 55% of these had stock in a street name.

Nor would the coupons presented for payment give the names and addresses of the debenture holders. The greater number of these were presented through collecting banks and, although BOEING might have ascertained the owners through the banks, it was under no duty to do so.

Plaintiffs' argument that the majority of the debenture holders never saw the Indenture as they would have had to go to the Trustee or to the Securities Exchange Commission in Washington, is answered by the fact that the debenture itself contained the provisions for notice and the warning that the debentures could be called, as well as by law on the binding effec of the terms of the Indenture as a contract, whether or not they saw it. (York v. Guaranty Trust Company of N.Y., 326 U.S. 99; 143 F. 2d 503 (C.A. 2, 1944); U.C.C. Sec. 8-202(1) 2d ed.)

But plaintiffs further argue that the debenture holders are not bound by the terms of the Indenture because these terms were inconsistent with those of the debenture and the Prospectus which accompanied the issue in1958. Thus, they purport to find some inconsistency in the words "not less than 30 days' notice nor more than 90 days published notice" (Prospectus); "not less than 30 nor more than 90 days prior notice as provided in the Indenture" (debenture); and "the first such publication to be not less than 30 days and not more than 90 days before the date fixed for redemption"

(Indenture Section 5.02). They argue that the plaintiffs, as debenture holders, might have thought that this meant 30 days' continuous publication and that any doubt must be resolved in their favor. The language is pristine clear - 30 days' prior notice; this was what was given, and more.

Kaplan v. Vornado, 341 F. Supp. 212 (N.D., Ill., 1971) is dispositive of this claim. There, in answer to the same argument, the Court held that the debenture holder was bound by the terms of the Indenture, which he did not see, as well as by the terms of the Debenture, which he did not understand; and that the notice was sufficient, even though it was published in a New York newspaper and in various publications which plaintiff, a resident of Kansas, never saw.

In Abramson v. Burroughs Corp., 67 Civ. 1426 (S.D.N.Y., 1972), Judge Lumbard held that notice by publication in the New York Times and the Wall Street Journal was reasonable as "best calculated to come to the attention of the Burroughs bondholders" or their brokers, and that publication four times within the thirty days prescribed by the Indenture, with termination of the privilege the fifteenth day prior to the redemption date, was sufficient notice (Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) and the other cases relied on by plaintiffs are not relevant in that, in those cases, the Courts struck a notice by publication as insufficient to bar a party in a judicial proceeding where another kind of notice was possible. Walker v. Hutchinson, 352 U.S. 112 (1956) condemnation proceedings; New York v. N.Y. Central R.R. Co., 344 U.S. 293 (1953) wiping out a tax lien in a bankruptcy proceeding.)

Finally, plaintiffs argue that the defendant violated the Trust Indenture Act, 15 U.S. C. Section 77aaa et seq., in that, under the Indenture by Section 8.01, 8.02, BOEING was required to furnish Chase Manhattan bi-annually with current names and addresses of bondholders and that this would have permitted Chase Manhattan to notify those additional bondholders. The answer to this is that it was stipulated that BOEING had no names to furnish Chase Manhattan and so advised it under the terms of the Indenture.

Plaintiffs held the debentures which clearly stated that they could be registered; plaintiffs could have done so and they would have been notified by mail of the call thus eliminating the real risk of not seeing the notices and press releases. Plaintiffs chose not to do so, and they must bear the consequences (Kraus v. Laclede Gas Co., 354 S.W. 2d 327 (St. Louis Ct. of App., 1962)).

I conclude that the notice of call was reasonable, valid and adequate.

I now turn to consideration of:

THE CONVERSION RATE

In an ingenious argument, in order to get around the sufficiency of the notice, plaintiffs next argue that it was a condition precedent to a valid call that defendants adjust and publish an adjusted conversion rate and notify the Trustee; that defendants did not and that this rendered the call invalid and insufficient to cut off debenture holders' right to convert.

The defendants' rejoinder is that the rate of conversion fixed by it was in strict compliance with the terms of the Indenture and that these

should not be rewritten to support the plaintiffs' claim; that the Board of Directors made its determination as to the conversion rate with due regard to its dual responsibility to both stockholders and bondholders; that, in any event, an error in the conversion rate would give a claim to those bondholders who did convert relying on the notice and not to plaintiffs who claim they received no notice of the conversion.

Solely for purposes of discussion, I will assume that an error in the conversion rate would void the call and that such an error, even though I find none, would be sufficient to save plaintiffs' claim. I turn to that aspect of this suit, and consider the merits of this claim.

There were three transactions which, according to plaintiffs, might have necessitated an adjustment in the conversion rate applicable to the debentures in accordance with Section 4.05 of the Indenture: the 4% stock dividends declared in November, 1958; the 2% stock dividend declared in November, 1959; and the acquisition by BOEING on March 31, 1960 of substantially all of the assets of Vertol Aircraft Corporation.

As of March 10, 1961, up to and including the redemption date of April 8, 1966, BOEING treated the conversion rate as 2.0448, and it contends that this is the proper conversion rate. It is plaintiffs' contention that the proper conversion rate is 2.0725 or more. The significance of this is that, if plaintiffs are right, the debenture holders would have been entitled to additional shares of stock on conversion and additional duties were imposed on defendant under the Indenture which they did not fulfill.

Essentially, it is plaintiffs' contention that initially BOEING computed the value of the 4% stock dividend correctly, but that the following year it recomputed it for the express purpose of keeping the conversion rate from rising above 2.5 at a time when it was negotiating with Vertol in order to injure the debenture holders and benefit its stockholders.

It is of record that on November 3, 1958, BOEING declared a limited stock dividend of 4%. The closing price of Boeing Capital Stock on that dte was $56.875 and the number of shares issued under the 4% dividend was 281,537. On or about December 31, 1958, BOEING made a conversion rate computation with respect to this 4% limited stock dividend. BOEING took the November 3, 1958 NYSE closing price of $56.875 and divided it by 1.04 (representing the number of shares including the 4% dividend shares) and reached a figure of $54.75 which was the value of each shre after dividend. This figure, multiplied by the number of shares issued, 281,537, resulted in $15,414,151 - the total consideration paid for the shares issued. Applying the formula for calculating the conversion rate, the "Conversion Rate Calculator" (Section 4.05), it reached a figure of 1.9927. The numerator being 731,898,400, total number of shares outstanding, divided by the denominator, the total consideration received therefor or $367,286,501, the conversion rate, therefore, was below 2.05 and it required no adjustment.

On November 2, 1959, BOEING declared a limited stock dividend of 2% and issued 147,489 shares at the market price of $30.375 or a total consideration of $4,479,979.

For purposes of this dividend, however, BOEING, in computing the consideration received for the shares, did not divide the market price $30.375 by 1.02 (to include the 2% dividend shares) because if it had, the consideration would have been reduced to $29.77 which result would have required an adjustment in the conversion rate since that quotient would have been 2.0089 instead of 2.0052.

In December, 1959, BOEING then recomputed the 4% limited stock dividend of 1958 to conform to the computation used on the 2% dividend and to exclude the additional 4% shares represented by the dividend so that now it reached a flat market price of $56.875 (not divided by 1.04). The result was that the total consideration for the 281,537 shares issued was under $16,012,417, which the formula still did not change the quotient sufficiently to require adjustment of the conversion rate.

A tabulation of these calculations is as follows:

4% dividend - 281,537 shs. x $54.69 = $15,414,151 (corporate accounting meth.
" x $56.857= $16,012,417 (Indenture method)

******

2% dividend - 147,489 shs. x $29.77 = $4,390,748 (corporate accounting meth.
" x $30.375= $4,479,979 (Indenture method)

******

Quotients computed according to Section 4.05 of the Indenture:

Quotient for 4% dividend under either method below 2.05: 1.9927; 1.9895
Quotient for 2% dividend under Corporate Method = 2.0089
" " Indenture Method = 2.0052
(See Defendant's Exhibit No. 20.)

Obviously, one of the reasons for the recomputation of the "Conversion Rate Calculator" on this dividend was to conform it to the method used on the 1959 2% stock dividend.

From this ,plaintiffs argue that defendant was on a course of deliberating keeping the conversion rate from going up, which would require an adjustment and the setting aside of more shares for the debenture holders when they redeemed their debentures.

Irrespective of the defendant's motive, it is clear that the original computation of the 4% limited stock dividend was not proper under the terms of the Indenture and that the computation of the 2% dividend and the recomputation of the 4% dividend in 1959 was in accordance with the terms of the Indenture. It appears that the 4% stock dividend was originally in 1958 computed according to the usual corporate accounting practice, that is, that the market value of the stock issued was computed by including the additional number of shares outstanding upon payment of the dividend. In the case of the 4% stock dividend, this would be 104 shares and, in the 2% dividend, 102. The terms of the Indenture are clear in that the market value of a limited stock dividend is defined as the last reported sales price on the date of the declaration of the dividend (Section 1.01). Plaintiffs would construe this to mean that this includes the sales price including the additional shares issued as a result of the dividend, or post dividend rather than ex-dividend, arguing that this is the more intelligent meaning because it represents more accurately the market value of the shares. This may be so but the Indenture was drawn by BOEING; how to define market value was its decision to make outof several alternatives. BOEING had a right to so define it, and, having done so, it had not only the right but the duty to comply with the definition set forth in the Indenture, irrespective of its motive.

Plaintiffs also attack the acquisition by BOEING of the assets of Vertol Aircraft Corporation at what they say was an arbitrary value placed on the stock of BOEING which was issued in exchange, in order to keep the conversion rate below 2.05.

In support of their position, plaintiffs point to the statement made by Vice President Haynes at a Board Meeting on April 4, 1960 after the contract with Vertol had been signed, that:

> "a calculation had been made as to the minimum value that could be placed on the assets of Vertol without an adjustment in the conversion price being required; and that such figure as adjusted for the amounts to be received upon the exercise of options was approximately $15,216,000.",

and to further statements by BOEING's officers that their "basic objective was to avoid dilution of the equity position of the stockholders."

The value placed on the Vertol acquisition was the market value of the BOEING stock on November 13, 1959 at $33-5/8 for a total of $15,895,748.

It is plaintiffs' argument that some other valuation should have been used, either the value of the acquired assets of Vertol on March 31, 1960 as recorded on the books of BOEING at $12,435,138.47 or the value of the BOEING stock at some other date, to wit: either January 18,1960, when the contract was signed when the stock was $30-5/8; or March 30, 1960 when the contract was closed when the BOEING stock was $24-1/8; either of which figures would have required an adjustment in the conversion rate.

Defendants rely on Section 405(b)(ii) of the Indenture which vests the Board of Directors with the power to fix the "fair value" of the consideration received when stock is issued other than for cash. Defendants represent that the decision of the Board was made after full deliberation, in good faith, with full realization of its duties to the stockholders of BOEING, and upon advice of counsel, its investment bankers and independent accountants.

I find that the facts are as follows.

As early as 1958, BOEING's management had been engaged in discussions with Vertol looking toward the possible acquisition by BOEING of Vertol. A committee, headed by the Company Secretary, was designated to study the matter and recommend; on November 11, 1959, a memorandum containing his and the President's recommendations was sent to the Board. The recommendation was for the acquisition on the basis of an exchange of stock - two shares of BOEING for three shares of Vertol. On November 13, 1959, at an informal meeting of nine of BOEING's thirteen Directors, attended by its President Allen, a firm decision to make the offer to Vertol on the two for three basis was made. On January 18, 1960, the Board formally authorized the execution of a contract with Vertol; the closing was had on March 31, 1960. Between November 13, 1959 and January, 1960, there were several discussions as the details were still tentative. Throughout these negotiations and meetings, defendants were figuring out various valuation theories to determine the result on the conversion rate.

The acquisition was done through a corporate reorganization in which the stockholders of Vertol received two shares of BOEING stock for each three shares of Vertol stock they owned, and received a total of 448,954 shares of BOEING capital stock. There were also Vertol stock options, which had been granted to employees at a prior time. These stock options amounted to 23,782 shares of BOEING at a value of $644,514; and the total consideration paid by BOEING for the acquisition was 472,736 shares of BOEING at 33-5/8, for an aggregate value of $15,895,748.

This is know as the "barter equation method", which permits consideration to be computed on the basis of shares issued.

The book value of Vertol at $12,435,138.47 was the figure used for the computation of the Pennsylvania State Excise Tax; had BOEING used this value, an adjustment in the conversion rate would have had to be made. Using the value of BOEING stock at 24 1/8 as of March 30, 1960, the quotient after applying the formula would have been 2.0687 requiring an adjustment to 2.07 shares; at the value used of $15,895,748 or $15,250,000 (which excluded the options), the quotient remained below 2.05. Thereafter, BOEING continued to use this method of computation for limited stock dividends under the Indenture, with the approval of its independent accountants, its counsel and its Company treasurer.

Plaintiffs admit that the formula provided for in the Indenture had as its purpose the prevention of dilution of stock to the detriment of BOEING stockholders. It was certainly BOEING's duty and right to compute

stock in such a way as to prevent its dilution and there is no evidence that it had any purpose of deliberately hurting its debenture holders.

While it is true, as plaintiffs point out, that on November 13, 1959 the matter of the acquisition was still tentative and does not appear to have been settled until some time in December at the earliest and that the date the contract was signed appears more rational, this Court cannot say that the Board of Directors had no colorable right to fix the "fair value" of the consideration as of November 13, 1959. The decision was carefully taken, not only with the approval of its accountants but of independent auditors, outside counsel, its investment bankers and underwriters, with the unanimous resolution of its Board and in good faith. This is the test rather than whether another method of valuation might seem more appropriate. In fact, plaintiffs admit that they can cite no authority which deals with the fixing of a date for purposes of valuation of antidilution clauses, which this is. As plaintiffs point out, any time stock is issued for consideration less than its market value, there results dilution. The provisions of Section 4.05 of the Indenture were clauses dealing with the problem. There is ample authority to support a decision made by a Board of Directors under similar conditions; in fact, it is conclusive. [Morris v. Standard Gas & Electric Co. 31 Del. Ch. 20, 63 A 2d 577 (1949); 11 Fletcher Corporations, Secs. 5221, 5334, 5344, (1971); Industrial & General Trust, Ltd. v. Tod, 180 N.Y. 215 (1905). See Matter of Marcus, 273 App. Div. 725, affd 303 N.Y. 711 (1951) to the effect that book value is not the true measure of stock; and Seas Shipping Co. v. CIR, 371 F. 2d 528 (C.A. 2) cert. denied 387 U.S. 943, for use of

the barter equation method for tax purposes.]

I conclude that neither the 4% nor the 2% Limited Stock Dividend, nor the acquisition of Vertol, nor any combination of these three events, required an adjustment of the conversion rate. I also conclude that, even if they had so required it and defendant had failed to do so, plaintiffs who did not convert could not benefit thereby because failure to convert when required to do so would not necessarily have invalidated the call. [6 Williston on Contracts, Sec. 842 (3rd Ed., 1962).]

I also conclude that there is no merit or substance to plaintiffs' final point that the defendant BOEING breached a contract it had made with the New York Stock Exchange, in that it failed to comply with the publicity requirements of the Manual and/or the Listing Agreement.

I have found that the publicity given was more than adequate, that it was in full compliance with the terms of the Indenture and the Debenture, and that is the only contract between plaintiff debenture holders and BOEING. The fact that further publicity was suggested or even required under the Manual of the Exchange, assuming it was a contract, would not help plaintiffs for defendant BOEING did comply with the publicity requirements of the Exchange. But even if it had not complied fully with the publicity requirements of the Manual, no case has yet held that the Manual is a rule of such importance in the "Regulatory Scheme" and as such "integral part in SEC Regulation" that a breach of it would expose defendant to "unexpected civil liability" at the suit of a third party. (Weinberger v. NYSE, 335 F. Supp.

139 (S.D.N.Y., 1971).) In fact, the law in this Circuit is to the contrary. (O'Neill v. Maytag, 339 F. 2d 164 (C.A. 2, 1964); Colonial Realty Corp. v. Bache & Co., 358 F. 2d 178 (C.A. 2, 1966); DeRenzis v. Levy, 297 F. Supp. 998 (S.D.N.Y., 1969).)

Buttrey v. Merrill, Lynch, etc., 410 F. 2d 135 (7th Cir., 1969), cert. denied 369 U.S. 848, relied on by plaintiffs, involved a totally different "rule" of the Exchange binding on a member company and plaintiff's claim against the member broker was upheld in the pleading stage solely because it charged the member company with fraud; the Court specifically saying that mere negligence might not support a federal claim. [McMaster, Hutchinson & Co. v. Rothschild Cor. C.C.H. Fed. Sec. L. Rep. #93,541 (N.D., Ill., 1972) which followed, distinguished Buttrey on this ground; Bush v. Bruns, Nordeman & Co. (S.D.N.Y. 72 Civ. 484) C.C.H. Fed. Sec. L. Rep. #93,674.] What I have said disposes of plaintiffs' third party beneficiary claim.

The Clerk is directed forthwith to enter judgment for defendants dismissing the complaints in the following ten actions on the merits with taxable costs and disbursements:

66 Civ. 1820 Van Gemert v. Boeing
66 Civ. 2384 White v. Boeing
66 Civ. 2385 Berglas v. Boeing
66 Civ. 2640 McNaught v. Boeing
66 Civ. 2786 Winer v. Boeing
66 Civ. 3005 Diener v. Boeing
66 Civ. 3054 Finn v. Boeing
66 Civ. 3403 Mittler v. Boeing
67 Civ. 280 MacMillan v. Boeing
67 Civ. 1053 Hoff v. Boeing

So ordered.

Dated: New York, New York
November 29, 1973

SYLVESTER J. RYAN
United States District Judge

slx 1.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WILLIAM R. VAN GEMERT, et al.,

Plaintiffs,

vs. 66 Civ. 1820

THE BOEING COMPANY (Formerly BOEING AIRPLANE COMPANY) et al.,

Defendants.

Before

HON. SYLVESTER J. RYAN,

District Judge.

New York, N. Y.
November 15, 1972 - 10:00 a.m.

APPEARANCES

NATHAN, MANNHEIMER, ASCHE, WINER & FRIEDMAN, ESQS.,
295 Madison Avenue,
New York, New York;
BY: NORMAN WINER, ESQ., of Counsel
and
IRVING STEINMAN, ESQ.,
11 Park Place,
New York, New York;
BY: IRVING STEINMAN, ESQ., and
SAMUEL WEINSTEIN, ESQ., of Counsel,
Attorneys for Committee of Plaintiffs.

KASS, GOODKIND, WECHSLER & GERSTEIN, ESQS.,
122 E. 42nd Street,
New York, New York;
BY: STUART D. WECHSLER, ESQ., and
MICHAEL P. FUCHS, ESQ., of Counsel,
Attorneys for Plaintiffs.

DAVIS, POLK & WARDWELL, ESQS.,
1 Chase Manhattan Plaza,
New York, New York;
BY: S. HAZARD GILLESPIE, ESQ., and
WILLIAM H. LEVIT, JR., ESQ., of Counsel,
Attorneys for Defendants.

- - -

THE COURT: Are we ready?

MR. GILLESPIE: Ready for the defendants.

THE COURT: Who is going to appear for the defendants?

MR. GILLESPIE: The defendants are represented by Davis, Polk & Wardwell, by S. Hazard Gillespie and William H. Levit, Jr.

Perhaps at this time it might be appropriate to state this: Mr. David Wagoner of Seattle has been co-counsel with me in this case throughout the years. He is here at the counsel table at the moment. His firm appears on the briefs, and has up to this time, but he has a statement he would like to make to the Court.

THE COURT: All right, I am glad to hear anybody from Seattle. That is a familiar place for me. I held

court there a number of times.

MR. WAGONER: Your Honor, it has now become apparent that one of my partners, Mr. Harold Olsen, will be called by the plaintiffs as a witness. In view of that fact I would think the appropriate thing for us to do, our firm, would be to withdraw as counsel of record, and I would like permission to do so.

THE COURT: Well, you don't have to. I don't think there is a conflict, but if you want to sit here --

MR. GILLESPIE: Mr. Wagoner has been with me.

THE COURT: If you want to withdraw as counsel of record you may do so. I understood Mr. Gillespie's firm were counsel of record.

MR. GILLESPIE: That is correct.

THE COURT: You can sit here. I don't see any reason why you can't. That is, if you would like to.

MR. WAGONER: I would like to.

THE COURT: All right, you're welcome.

Anything else you want to take up before we begin?

MR. WINER: I think there are certain procedural matters which should be taken up, although I believe the possibility or their creating difficulty has been minimized by agreement of the parties.

As your Honor knows, I have worked primarily on

the question of the conversion rate and the question of the propriety of the notice. Mr. Wechsler has worked primarily on the question of the Stock Exchange rule, and also has worked on the notice question.

Now, as I understand it, the defendants have asked me to call Mr. Allen out of turn, and I believe that plaintiffs' attorneys are willing that that should be done. I certainly am.

The next procedure, as I understand it, is that Mr. Wechsler would call Messrs. Olsen and Haynes simply on the issues of the Stock Exchange news release, and they will thereafter, I am informed, appear as witnesses for the defendants when the defendants' case comes up. So I believe that the possibility of Mr. Wechsler and me having to cross-examine on different issues will probably not arise, but we should appreciate it, should it arise, that Mr. Wechsler would be able to ask the same witness questions on the Stock Exchange issue, and I on the conversion rate and other issues. I don't know that it will arise.

THE COURT: I am not willing to try a case that way, seriatim. I am willing that you call the witnesses in any order that you want, but when that witness takes the stand that witness is to testify both on direct and cross at one time. I am not going to take his testimony seriatim.

You will exhaust that witness, and that witness will be examined by one attorney representing each party. I am not going to have a series of relays of cross-examination or direct examination by two lawyers of the same witness.

MR. WINER: Your Honor, perhaps I did not make myself clear --

THE COURT: You make yourself quite clear, and I trust that I made myself quite clear.

MR. WINER: Well, sir --

THE COURT: You may have an exception to my ruling if you want to.

MR. WINER: Yes, I should like to.

But are you precluding the possibility of the defendants calling the witness in behalf of the defense after he has testified for the plaintiff?

THE COURT: I say I am not precluding him, but I regard it as being duplicitous of the testimony, and I think that once a witness has taken the stand he should be examined by all parties on all subjects at one time. If there is need to bring him back, and you can justify it, of course I will not refuse to hear him later. But if you know that you are going to examine him on certain matters, I don't want the testimony of a witness seriatim on matters which are known to you in advance. If you want to call him again there must be

some justification for it.

All right.

MR. WINER: Your Honor, may I have a few moments to discuss this, because this will create a problem in the presentation of the case.

THE COURT: I don't think it will create as great a problem as you think.

MR. WECHSLER: Your Honor, I concur with Mr.Winer in the way --

THE COURT: Thank you very much. I made my ruling, and I think I have been very patient.

Now I will give you a few minutes.

There was a stipulation of facts in this case, was there not?

MR. WECHSLER: Your Honor, there was a stipulation not of facts, but what certain witnesses would testify to subject to a variety of possible objections to materiality --

THE COURT: There was a stipulation, subject only to objection as to relevance and materiality.

MR. WECHSLER: And to the right to cross-examine and add to their testimony.

THE COURT: I think I was to be notified, under the stipulation, if you were going to bring any additional testimony out from that one witness, was there not, under

their depositions before the date of trial, and if you didn't take the depositions that it would be deemed that while you did not concede the truth of the testimony of the witness, you would offer no evidence to directly contradict him, and your only objection would be as to relevance and materiality.

Now, that is my recollection.

MR. WECHSLER: That had been contained in the stipulation, your Honor, and subsequent to the date of the stipulation there were stipulations regarding the witnesses to be called by both parties, and there was correspondence back and forth between plaintiffs and defendants --

THE COURT: I told counsel in this case some time ago, I don't want matters handled by correspondence. I should like it handled by legal documents. I have stated that many, many times. Lawyers have a habit of writing letters. I don't like letters. If you have any matters to bring before the Court, bring it before the Court on formal papers. Remember that. I told you that many times. I want things made a matter of record by legal steps.

Now, do you want a recess of a few minutes?

MR. WINER: I think if we could talk together, perhaps, with defense counsel we could come to an accommodation of this.

THE COURT: Suppose you do that at recess. It was

my plan to get an opening statement by both sides.

MR. WINER: Yes, your Honor --

THE COURT: Let us have that. Then I will give you a recess.

MR. WINER: Well, we are confronted -- does your Honor make the same ruling with respect to opening statements by --

THE COURT: I think there should be one opening statement from each side, that is all.

MR. WECHSLER: Your Honor, for six years Mr. Winer and myself have each worked on different aspects of this case. I am not capable of making an opening statement or examining witnesses on all the causes of action, and Mr. Winer may or may not be, your Honor --

THE COURT: I will only hear one attorney for each side on opening statements.

MR. WECHSLER: Your Honor, my opening statement will run less than five minutes, and I beg your permission to make that statement, because I think it will be short and concise and will not burden the Court.

THE COURT: If I permit that, that will be no indication that I will permit you to examine the witness seriatim.

MR. WECHSLER: I understand that, your Honor.

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THE COURT: Is that agreeable to Mr. Gillespie?

MR. GILLESPIE: Yes, sir.

THE COURT: All right, let me hear from the plaintiffs. Now take your time.

MR. WINER: If your Honor please, as you know, this case arises out of the fact that the defendant claimed an option to terminate the right of the plaintiffs to convert their debentures into common stock.

The defendant published a notice in the Wall Street Journal on March 8, 1966, and another one on March 18, 1966. Various plaintiffs did not see the notice. Various plaintiffs thereafter tendered their bonds for conversion.

Defendant refused to convert; the defendant claimed that the time for conversion had expired.

As a result the holders of some $1,544,300 worth of debentures face value, lost upwards of $4,000,000.

There were various losses suffered by other people in slightly different connections, different causes, and I will come to that in a minute.

Now, to go back to the history:

In July of 1958 the defendant Boeing Company issued $29,560,000 odd worth of debentures. These debentures were called convertible 4-1/2 percents of 1980.

The debentures were sold, obviously, at least

75 percent to stockholders. The reason I say that it is obvious that at least 75 percent went to stockholders was that some 76 or 77 percent of the rights on which debentures were bought were never transferred by the original stockholders to whom they were issued. So that we know that at least 75 percent of the holders of the debentures in 1958 were stockholders, and as the evidence will develop the probability is that there was a greater percentage.

These people acquired the bonds, most of them, in July of 1958 --

THE COURT: These bonds were callable before 1981?

MR. WINER: These bonds had cross options. They could be called by Boeing on a kind of notice which will be a subject of controversy here, and redemption prices declining by a quarter of a point each six months or a year over the period all the way to 1980.

The option of the plaintiffs or the bondholders was to convert into common stock at two shares each $100 face amount of debenture, and the two share figure was subject to adjustment based upon certain complicated features in the indenture; and the application of those provisions of the indenture will be one of the subjects of testimony and proof before your Honor.

Now, in November 1958 the corporation, Boeing,

declared a 4 percent stock dividend. A stock dividend, a limited stock dividend, is an item which under the terms of the indenture called for an adjustment of the conversion rate.

Boeing, accordingly, made a computation with respect to the adjustment of the conversion rate, and they made it exactly the way we say they should have made it.

THE COURT: You find no fault with that?

MR. WINER: No fault with that.

In November 1959 Boeing declared a 2 percent stock dividend, so that a new calculation was in order.

At this time they were considering the acquisition of the Vertol Aircraft Corporation.

They had not only to compute the rate adjustment on the 2 percent stock dividend, but also they had to look ahead and see what the Vertol transaction was going to do to the conversion rate.

The reason they had to do this is that according to their testimony they were concerned about the possible dilution of the common stock, which I believe means that they were concerned that if there was a conversion of the debentures, there would be a great many more shares issued, and in their opinion the value of their common stock would be diluted.

So I will now not characterize - we will try to get that from the witnesses - but the simple fact is that they turned around in 1959 and instead of computing the way they had computed in 1958, they reversed the computation which they had made in 1958, applied their new system to the 1959 one, and then went ahead with their Vertol transaction.

At a meeting, an informal meeting attended by nine members of the board of directors on November 13, 1959, one of the senior vice-presidents of the corporation told the members present that if they acquired Vertol they were going to have to change the conversion rate; they would have to give the debenture holders more shares of stock than the two for each $100. This is all documented in the stipulation.

So what they did was, they took care of that situation by changing the adjustment for 1958 and 1959, and by a little hocus-pocus with the figures on the Vertol transaction, which I would be glad to explain to your Honor in a minute or two, unless you wish me to go into those specifics now. Perhaps I should.

The contract on Vertol was closed January 18, 1960, or as of January 18, 1960. The closing of the transaction was on March 31, 1960. When they came to compute for the

purposes of the adjustment of the conversion rate what the consideration received by Boeing was for the shares issued through Vertol, they took this method:

They went back to November 13, 1959, and took what was allegedly the closing price on that day; they multiplied it not only by the shares which they gave to Vertol, but also by the shares which they gave for Vertol options, individual stock options held by Vertol employees; got a total of $15,895,000, and then subtracted from that the value, the actual dollars that they would be on the Vertol options, and left themselves with $15,250,000.

Actually, this was a distortion, because what it means is that they took the Vertol stock not at the closing of 33-5/8, but at 34.

So even that theory which is in the stipulation, and by which I think they are bound as to how they computed this value, even that was manipulated.

And I should say to you that according to the minutes one director arose and asked them:

"What is the minimum that we can ascribe to the Vertol value without having to change the conversion rate of the debentures?"

And they were informed that it was 15,216,000. So by finding a way to get to 15,250,000, they avoided a

change in the conversion rate by $34,000. They admit that had they taken $34,000 less than 15-250 they would have had to adjust the conversion rate, and this is whether they were right or wrong --

THE COURT: What would the adjustment be --

MR. WINER: The adjustment would be 1/20th of a share for every $100, and that 1/20th of a share in 1966 was $9 for every 100 -- $9-odd. I think I calculated it at an 11 percent of the original bondholders investment.

That is the extent of the distortion.

Now, consequently, they carried out none of the provisions of the indenture which were required in the event of a change in the conversion rate. Those provisions were that they should publish notice so that buyers and sellers and holders of the debentures would know what the new conversion rate was; but they didn't publish any new ones.

They were supposed to reserve additional shares to cover the change. They did not do it.

They were supposed to give notice to the trustee. They did not do it. In fact, they did not do anything except keep in their confidential records these calculations, which by good fortune we have been able to discover, and we will be able to demonstrate to your Honor.

THE COURT: What would have been the difference in

the ultimate conversion rate on each $100 bond?

MR. WINER: As I see it, in 1966, as I say to your Honor, there would be 7/100ths of a share for each $100, and I believe that that would come to about 11 percent of the original cost.

The stock was selling, your Honor, at $182 a share on April 14th --

THE COURT: When they converted what did they pay for a share in dollars and cents, when they called and paid in cash?

MR. WINER: When they paid in cash?

THE COURT: Yes. What did they pay?

MR. WINER: When they paid in cash they paid $1,032.50.

THE COURT: What do you claim it should have been?

MR. WINER: On the redemption?

THE COURT: Yes.

MR. WINER: Well, that is fixed in the debenture. I assume whoever converted got 103-1/4.

THE COURT: So this Vertol situation cut down the amount on the redemption?

MR. WINER: No, it did not change the redemption. It only changed the conversion rate.

THE COURT: All right, one more question: When

they fixed this Vertol figure, was notice sent of that to all the bondholders and to all the stockholders?

MR. WINER: No, sir, it wasn't sent to anybody.

THE COURT: Wasn't it reported in their annual notice?

MR. WINER: It was not.

THE COURT: Was it never mentioned as to how it was computed or in what amount it was computed?

MR. WINER: Not to my knowledge. The only letter in the record that I found is an inquiry by Moody Services, and I don't believe that was on Vertol; I think that was after the stock dividend. Moodys asked them where there was any change in the conversion rate, and they wrote back, no.

Now, it is our position that this was a breach of contract. It was a failure to perform a condition of the option. When they failed to change the conversion rate they lost the right to terminate the plaintiffs' options to convert. In other words, that promise or that condition, whichever it is, would have to be performed before they could demand that plaintiffs' option to convert be ended.

Now, in the State of New York - and it is the law of the State of New York which applies - a willful breach of contract -- and I believe it is inescapable that this was

willful - would terminate all of their rights under the contract, not only, one, to terminate the option, but also any other rights that they might have, and this, of course, will be briefed.

THE COURT: What do you mean by a willful act? You mean a deliberately fraudulent act?

MR. WINER: I wasn't going to use the word, but I believe it was fraudulent. I believe it was fraudulent. I believe that when your Honor hears the testimony and reads the exhibits -- in fact, I think the exhibits without the testimony -- your Honor will conclude that the bondholders were plain cheated, and I think that was their whole purpose at the time, and they did it, and it would never have come to light but for this fact, but for the failure of certain bondholders in 1966 to see the notice.

THE COURT: You say that New York law applies?

MR. WINER: Yes, sir.

THE COURT: That was stipulated in the indenture?

MR. WINER: It is in the indenture, yes, sir.

THE COURT: All right. Boeing is not a New York corporation?

MR. WINER: No.

THE COURT: It is a Delaware corporation?

MR. WINER: Yes, sir.

Now, I could elaborate on this, but let me just say briefly the following, and then I will suspend on this:

In connection with the stock dividend they transferred from surplus to capital excatly the right amount. They took the number of shares when it was a 4 percent stock dividend and they divided by 104, and they transferred the dividends to capital. The same with the 102. And this they did for four years in a row - 1956, 1957, 1958 and 1959 - and that is absolutely proper accounting.

But when they came to calculate for purposes of the debentures, then they changed their figures, and they ascribed a value to the stock dividend shares as if the full share before the stock dividend was worth exactly the same amount as the greater number of the - as one of the greater number of shares was worth after the stock dividend.

Now, it is my understanding that they claim that under the terms of the indenture they were entitled to do this, and I guess this will be a question of interpretation of the contract for the Court.

When they came to the Vertol transaction, for purposes of their bookkeeping they took a pooling of interest and they took Vertol in at $12,435,000. But when they came to calculating for the debenture holders they took $15,250,000.

And so one of the questions before your Honor will

be whether you can interpret the indenture and the action of the board as justifying double sets of books, one for the debenture holders and one for the corporation.

Now, I will leave that question.

We come now to the question of the adequacy of the notice.

I told your Honor that in accordance with the words of the indenture, they were permitted to publish twice in an authorized newspaper not less than 30 nor more than 90 days before the redemption date, and they claim that the Wall Street Journal is an authorized newspaper.

"Authorized newspaper" is defined in the indenture as one of general circulation in the Borough of Manhattan, City of New York, and it has been held in other cases -- I don't believe that any Federal Court has so held; lower courts in New York have so held -- that the Wall Street Journal is a newspaper of general circulation in the Borough of Manhattan.

We believe it is not, and that is a question which we shall submit to the Court.

However, there is more than that involved.

It is our opinion that in this kind of contract, which is called a contract of adhesion, where one party prints it up at great length and the other party either takes

it or leaves it, he either adheres to it or he doesn't adhere to it, that this kind of contract the law has gone way beyond where it was when I was in law school, and it now recognizes the fact that fairness of one party to the other is required in the case of a contract of adhesion.

It is our position that there were lots of ways to get in touch with the debenture holders. When they thought in the early part of 1966 about redeeming these debentures, all they had to do was go to the records and find out who collected the coupons on January 1, 1966, and they would have reached most of the debenture holders.

They also well knew that 75 percent plus of the debentures had been purchased by the stockholders in 1958, and they could have notified the stockholders, and it is in the stipulation that the First National City Bank did have, and still has, all the warrants on which the purchases were made, and that for an insubstantial cost they could have notified the people.

I am going to have other things to say on this, but I don't want to go into it at this point. I prefer to wait until witnesses are on the stand.

Now I want to say, your Honor, that in two cases, which are very difficult to distinguish so far as the opinions are concerned -- and I haven't been able to get hold

of the records -- it had been held by Judge Lombard, sitting as a District Judge here within this past year, and by Judge Napoli in Chicago, that the bondholders were bound by the terms of this indenture, no matter how ignorant they were; if they didn't see the notice they were bound.

One of the principal arguments which I think is of some interest by Judge Lombard and the Judge in Chicago was that all of these bondholders could have registered their bonds.

Now, this sounds very appealing, but the law of contract of adhesion is a law simply because the people who sign these printed forms or accept these bonds usually are ignorant of their rights, and that is why they have to be protected.

And I would just like to say to your Honor that it is in the stipulation that out of $30,597,600 worth of debentures, the number which were registered was $2,175,700. So that $27,600,000 out of the $29,600,000 worth of debentures were not registered.

I think that if this had been brought to the attention of Judge Lombard or Judge Napoli in Chicago they might have had a somewhat different view of this.

Now, I don't want to go into it further, because it is all in the stipulation, and I think the other facts on

this will come from the witnesses.

Now, finally, in the light of your Honor's ruling I am going to say a word about Mr. Wechsler's point -- oh, I beg your pardon --

THE COURT: No, go right ahead. Let me hear you. You apparently are about to do it. Go ahead and say it.

MR. WINER: I am sorry. I didn't mean to encroach --

THE COURT: You are not encroaching. Go ahead and let me hear what you were going to say. I mean, that demonstrates my point that I had in mind before. Let me hear what you have to say, and then I will hear from him after.

MR. WINER: I certainly apologize, because it was wholly an error on my part --

THE COURT: It is no error. Maybe it is a lapse. Don't worry about that.

MR. WINER: The New York Stock Exchange has a manual which prescribes rules and regulations for all securities which are issued and listed on the New York Stock Exchange. Boeing's stock had been listed on the Exchange at least as far back -- well, for many years. In 1957 there was a new listing agreement by Boeing on the New York Stock Exchange. The debentures listed in 1958 were also listed on the New York Stock Exchange pursuant to this '57 agreement.

Now, the manual, at page A-10 says that whenever there is any change in the financial condition or relation between the company and the bond holder, this must be given immediate public notice. And the public notice which is required is specified: Not an advertisement, but a news release.

Boeing, on February 28, after the meeting of Directors issued a news release. But on March 2, 1966 when the date of the call was fixed, Boeing did not issue any news release. In fact, Boeing did not issue any news release after February 28, up until March 24, 1966. Therefore, it is clear that Boeing did not, and I believe that Boeing does not deny that it failed to comply with this requirement of the manual.

Now, the question then arises, does this failure

entitle the plaintiffs to recover against Boeing? Mr. Wechsler assume the burden of showing that the failure to publish in the news by a news release on March 2nd entitles -- disentitled Boeing to call the bonds; that this was a breach on its part because under various theories the plaintiff bond holders were third-party beneficiaries of a contract between Boeing and the bond holders and that therefore entered into contract between Boeing and the bond holders and there was a breach of contract by Boeing in not giving the news release.

Now, the question of whether this failure, whether a breach of a rule of the New York Stock Exchange is a basis of recovery by a security holder, is a question of law; and I know Mr. Wechsler wished to submit that to you as a question of law.

THE COURT: Have any case in point on that?

MR. WINER: I have not, no, sir. I don't believe -- I have studied the case, your Honor --

THE COURT: Now we will let Mr. Wechsler talk. Have you cases on this?

MR. WECHSLER: I think we have a case directly in point.

THE COURT: Where? What is the citation?

MR. WECHSLER: Buttrey v. Merrill Lynch, Pierce,

Fenner & Smith, 410 Fed 2d, 145, cited in 1969 by the Seventh Circuit.

THE COURT: That is citing a District Court case, isn't it?

MR. WECHSLER: Seventh Circuit decision. It is 410 Fed 2d, 135.

THE COURT: I have read it a number of times.

MR. WECHSLER: Yes, your Honor. There is a law article discussing that case, which I would also like to refer to and which is attached to Plaintiffs' supplemental memorandum, and also on the motion for summary judgment which plaintiffs made and which was not decided, by Louis D. Lowenfelds, entitled Liability Under Exchange Rules, published in the October 6, 1969 edition of the Review of Securities Regulations.

THE COURT: Did you write that article?

MR. WECHSLER: No, I did not write that article. That was written by Louis D. Lowenfelds. It was the third of a series of articles in which he discussed potential liabilities and he found that the Buttrey case was a landmark. And he stated in his article, "Private liabilities under exchange rules may be sustained not only against investment banking firms but also against listed companies that violate the terms of their listing agreements.

And he based that primarily on Buttrey and Buttrey's interpretation of Colonial Realty Corporation versus Bache, 358 Fed 2d 278, decided in the Second Circuit in 1966.

In that decision Judge Friendly, while denying liability on the particular aspects of that case, indicated that there could be liability for violation of Stock Exchange rules if those rules were not rules designed for housekeeping, but designed for the protection of the public.

There was also a discussion in that case and in the articles as to the types of rules under which liability would be imposed, because nobody has contended, least of all the plaintiffs here, that liability should be imposed because of every violation of every Stock Exchange rule. And the test of Lowenfelds and Colonial Realty I think recognized in Buttrey, is that the test should be whether that rule was designed to protect the public, and plays any part in the regulatory scheme.

There is authority also under the securities act itself, under Sections 6 and 19, and Section 27 thereof. And those arguments are made in detail in Plaintiffs' trial memorandum.

There is one case which was recently the subject of a supplemental brief, to which plaintiff has not had

an opportunity to respond. I believe the name of that case is the McMaster case. And that is a District Court opinion by Judge Bower which held in effect that there could be no liability for violation of a Stock Exchange rule. Defendants rely heavily on the McMaster case to defeat the plaintiffs' cause of action here.

We contend, first of all, that McMaster, which attempts to distinguish Buttrey, misreads it. And secondly, that it is clear that under McMaster there would never be a liability for violation of a stock exchange rule which flies in the face of Buttrey, the development of the law over the last 15 or 20 years, implying liabilities, first under Section 10(b)5, then for violation of Stock Exchange rules, and then defining that in terms of whether that rule was designed to protect the public or not to protect the public. So I think there are numerous cases leading to this. There is the Silver case, and there are other cases cited in our brief, which gave rise to this initially, but the Buttrey case was the ultimate determining decision in that connection.

And the law review articles having discussed the Buttrey case are unanimous in indicating that there should be liability imposed for violation of Stock Exchange rules or the equivalent thereto if those rules were designed

to protect the public. I think we can demonstrate that Section A10 of the manual is a rule under the Securities Act of 1934 which was clearly designed to protect the public and only the public, and if that is not that type of rule such as Section 405 of the law, which was the "Know Your Customer Rule," which has certain housekeeping aspects, and which is not as definitive as Section A10 of the manual.

We also, your Honor, are so convinced of our position in this connection that we request that you solicit an amicus brief from the Securities & Exchange Commission on this matter, as you did in the question of whether that should be declared a class action under Section 23(b) 1, 2 or 3. We believe that this area is an extremely important area to the SEC and in one case, in a similar issue, they did write an amicus brief, and are quite familiar with the issues raised by the defendants here, which seek to set the law back in this area 20 or 30 years.

THE COURT: I am not going to request any such brief. I am surprised that you don't have confidence in your own brief.

b2 MR. WECHSLER: Well, we do have confidence in our brief, your Honor. I would like, however, to get

back to the specific violation that Mr. Winer covered previously, aside from the fact that the reference to this section of the manual, I think Mr. Winer made a minor mistake in that it was not a page reference, but Section A10 of the New York Stock Exchange manual.

It starts out by saying the company's listing agreement with the Exchange requires immediate publicity and immediate notice to the Exchange in respect of any corporate action which will result in or which looks towards the redemption of a listed security, either in whole or in part. It then goes on at length to define the term "publicity" as used in the foregoing paragraph. And it indicates that not only certain publicity be given, but the New York Stock Exchange must be notified. And it makes incredibly clear the exact details of that notice because it indicates that a mailed notice to the Stock Exchange, or even a mailed news release would not be sufficient, but by telephone or telegraph would be the fastest available means. It then sets forth exactly to whom the release must be issued. For example, it details that the release, the present release must be made to New York City newspapers of general circulation publishing financial news; to Dow Jones, and to others. And that this release must be given immediately.

On February 28, when Boeing, the Boeing Board met and passed a resolution authorizing the call of debentures, the resolution did not mention a redemption date nor did it mention a date upon which the conversion privilege would expire. On that date, February 28, Boeing immediately seemed to comply with that Section A-10 of the manual and their listing agreement which they signed and were bound to, by doing exactly what was required in Section A-10.

They issued a news release, a general news release t o the New York City papers of general circulation; to Dow Jones; and met the other requirements of Section A-10. The only problem was, this doesn't give any debenture holder and didn't give any debenture holder the privilege of knowing when his conversion privilege would expire. So it's a useless release.

At that Board meeting Boeing took the peculiar action of not having set the date for the redemption and assigned it to officers of the corporation. The stipulations of fact and the testimony which I will adduce will indicate that on March 2, 1966 there was a meeting at which Boeing firmly set the date for expiration of the conversion privilege at March 29 and the redemption date at April 8.

THE COURT: Meeting of what?

MR. WECHSLER: There was a meeting of a variety

of officers of Boeing.

Q Was it the Board of Directors? Was it an Executive Committee?

MR. WECHSLER: This was not any kind of committee. It was a meeting of people who claimed to have been in attendance from March 2nd to March 4th. On March 2nd a letter was sent by Mr. Thornton, the Treasurer of Boeing, to Chase Manhattan, saying we have selected the redemption date and the conversion date.

THE COURT: Do you claim that that date was not actually and proper set by Boeing?

MR. WECHSLER: We don't raise that issue, no.

THE COURT: You concede that the date was lawfully set in accordance with Boeing's certificate of incorporation, in accordance with the terms of the debenture, in accordance with the By-laws of Boeing?

MR. WECHSLER: Your Honor, we haven't raised that as an issue of the case. We are not raising that as an issue. I will concede that, your Honor.

THE COURT: Why do you mention this? What significance has it?

MR. WECHSLER: The significance is that on March 2nd -- the significance is that on March 2nd when the conversion date and the expiration dates were set,

this is the most important action that Boeing was ever to take with reference to those debentures. And on that date they were required by Section A-10 and this agreement to issue a press release. They issued a press release on February 28 which did not indicate the date on which the right to convert expired.

On March 2nd, when they finally set the date after receiving a call from the New York Stock Exchange on March 1st, they didn't issue a press release. They didn't issue it on the 2nd or 3rd or 4th or 5th or 6th. As a matter of fact, they didn't issue it until March 25. And even then it didn't comply with Section A-10.

THE COURT: They issued a press release on March 25 and also inserted an advertisement, didn't they, in the Wall Street Journal?

MR. WECHSLER: Yes. And Section A-10 --

THE COURT: Which owned by Dow Jones, isn't it?

MR. WECHSLER: Your Honor, Section A-10 specifically refers to the advertisement that they issue and says that it shall not be sufficient in the redemption of debentures to rely upon the formal notice of redemption which Boeing published. And I do not think that they had a right to decide what publicity they would like to give, and that is not even what they say. They claim that all

they had to do was to comply with the terms of the indenture and whether the Stock Exchange Section A-10 or the listing agreement required them to do more, was not important. I think I can prove that to you, that they did not comply in any way. I mean, it's clear that they didn't comply in any way with that section. And if you read that section clearly, it runs for a couple of pages, it answers some of your questions.

For example, a specific question is whether the advertisement, that formal small-print advertisement that people purposely ignore in every newspaper, a tombstone type advertisement in small print, is exactly what Section A-10 was designed to prevent. And that they specifically incorporated into the listing agreement, so that regardless of liability under Stock Exchange rules and regulations and the listing agreement, even under common law, the only beneficiary of Section A-10, the party to whom this was directed and supposed to protect is the public holders of the convertible debentures, to make sure that no company would get away with what Boeing attempted to get away with when they called these debentures by relying on the minimum possible notice requirement in a printed advertisement in some newspapers, and they didn't even permit it to be done by mail.

They said you have to do this by telephone or telegraph, and they specified whom to release this information to. That was a substantial breach of the contract on their part. They didn't even have the redeeming quality of equity in their favor, because what they got was the unjust enrichment of preventing people who owned $3500 worth of a bond on one day, having it turn into a thousand dollars the next day, simply because they failed to meet the specific publicity requirement set forth in Section A-10 of the manual. And it is hardly a negligent violation, where on February 28 they recognized this apparently by complying with it. Even if it were a negligent violation, nevertheless, it's a contractual violation giving rise to liability here.

THE COURT: Counsel, what you are doing now is giving me an argument instead of what you are going to prove. All right. I think I have been very indulgent with you, don't you?

MR. WECHSLER: Yes, sir, your Honor. I was making an argument on that point, and I am prepared to call my first witness.

THE COURT: Wait a minute.

b3 MR. GILLESPIE: I really thought we'd almost gotten to the place of closing statements, as I listened to the

last few moments. Your Honor questioned Mr. Winer and Mr. Wechsler if they had any case which supported this view they have with regard to the Stock Exchange rules. And our position is clearly that there is no such case, and we have cited on our briefs a case in this circuit in 1964 which holds squarely that there is no such implied cause of action.

Furthermore, the case which they have referred to, this Buttrey case, is a case which involved a member house of the Stock Exchange, and it involved its rules; and furthermore, it involved actual fraud, not any possible negligence.

We submit, and we are going to show your Honor, that these guidelines of the Exchange were complied with in spirit and in its specific provisions. But under no circumstances, if your Honor should conclude that there was anything further that might have been done, that this got anywhere near actual fraud. This Rothschild case, which worries my adversaries, the decision was rendered in February of this year and the Court said no case has been cited for the proposition that a violation of Stock Exchange Rules per se set forth a federally protected private right of action. In Buttrey against Merrill Lynch, actual fraud was alleged. The Court specifically stated

it was not finding Stock Exchange rules actionable per se.

The case factually similar to the instant one is Aetna. There the courts quoted from Aetna and said, "But even if we were to conclude that Rule 405 imposes the obligation for which plaintiff contends, we could not conclude that the failure to fulfill this obligation constitutes a Federal cause of action under the Securities & Exchange Act of 1934." Buttrey was distinguished by the Aetna decision on the same ground that this Court is distinguishing it: the absence of actual fraud.

THE COURT: What page?

MR. GILLESPIE: That is in my reply or supplemental memorandum, your Honor, which was just served and filed. It is dated November 7, 1972.

THE COURT: What page?

MR. GILLESPIE: That is at page 8, 9 and 10.

Now, your Honor, if I might just say a few words about some of the things that have been said by my adversaries in the form of their opening here. In the first place, I will address myself to this matter of notice, and what your Honor will hear from the witnesses and what your Honor will find in the agreed statement of facts and in the exhibits that have been stipulated to here.

We will show from those three sources that was done here by Boeing's representatives, by the representatives of the New York Stock Exchange with whom they worked on this and who handled this, and what was done by the Associated Press, met not only the letter and spirit of these guidelines of the Stock Exchange manual, but, more importantly, your Honor, the requirements of the indenture, which expressed the agreement between the debenture holders, their trustee, and the company as to what was to be done.

This will be established in large measure by these documents that have been stipulated to; but also by the testimony of the gentleman whom Mr. Wechsler and Mr. Winer have informed me that they wish to call. Mr. Hanes -- you disavow the desire, Mr. Winer?

MR. WINER: Right.

MR. GILLESPIE: Mr. Wechsler wishes to call Mr. Hanes, who if Financial Vice President of Boeing; and if he weren't going to call him, I would call him myself on this question. And Mr. Olsen, who is of the Holman, Marion firm in Seattle, and who are counsel to the Boeing Company, and who guided them and acted for them throughout this entire matter. And finally, of course, the admissions which have been elicited from the plaintiffs here.

In that connection I would just refer to one of

the admissions which was mentioned by Mr. Wechsler in the course -- or Mr. Winer in the course of their statement. This is a request that came from the plaintiffs to us, and they ask us to admit that Boeing did not issue any general publicity release as that term is defined in Section A-10 of the New York Stock Exchange Company manual concerning the call of the debentures during the period from March 1 through March 24, 1966. And we admit that Boeing did not issue any general publicity. However, we had these advertisements which appeared as required in the indenture, in the Wall Street Journal in the national issues. In addition, your Honor, and this is most important, Mr. Hanes will testify that he, on the 7th of March, when the date was fixed, talked with Mr. Raftery of the New York Stock Exchange, and Mr. Raftery arranged for the date to go out on the broad tape of the Dow Jones service. And, what is more important, this matter by reason of the action of the Stock Exchange in putting out information, which is on the stipulation of facts, the Associated Press carried from that point forward on its bond tables in newspapers with over 11 million circulation throughout the United States from the 9th of March through to the date when the convertibility feature terminated.

Leaving for the moment the matter of this notice

I would turn to the matter that Mr. Winer has addressed himself to, which came on belatedly in this case. And that is the matter of this conversion rate. We never heard about that when the complaint was filed, nor did we hear about it when your Honor issued his order declaring this to be a class action and specifying the members of the class. They were only brought forward in relatively recent times.

In connection with that I have two points which I would bring to your Honor's attention at this point. If the notice point failed, and we submit it must, then your Honor has no reason to go into the matter of this conversion rate. The complaint here is clear and your Honor's class action ruling is equally clear, that the class on whose behalf this suit is brought, of those debenture holders who did not convert their bonds and were subject to the redemption notice.

If I could just take one moment, your Honor, in your opinion --

THE COURT: That is correct. There is no doubt about that.

MR. GILLESPIE: No doubt about it, your Honor. Your Honor said each of the pending actions listed above is brought by present or former holders of debentures who

did not convert their debentures on or prior to March 29, 1966. And there is further with regard to that. So that if the notice point goes out, the conversion thing goes out completely.

In other words, Mr. Winer is in no position to act on behalf of in any way the debenture holders who came in and did convert and accepted the conversion rate which was involved here.

What they are really asking for here, your Honor, is not only they are saying we didn't get the notice, but in addition, we want to get more than the people who converted their bonds. That is what this claim comes down to. I resent the implication that is made here, that this action taken by the Board of Boeing Company was a fraud and that they were out to cheat the debenture holders.

When that finding came into the case I decided that the only thing to do was to call one of the principal officers of the Boeing Company to come here and testify as to what actually did happen in regard to this.

Your Honor, you will hear how back in 1960 the Board of Directors on April 4 met, and as required by the indenture with the convertible debenture holders, they determined -- and this is a quote from the provisions of the indenture -- what they believed to be the fair

value of the Boeing shares issued to the Vertol stockholders in acquiring the Vertol Company. And this Board of Directors, your Honor, at that time had the advice in acquiring of three different outside independent people.

They had the advice of this counsel in the first place, the written opinion of the Holman, Marion firm. They had the advice of Harriman, Ripley, their investment bankers. And, in addition, they had the advice of their outside independent auditor, the Ross, Touche firm, of which Mr. Gorans, one of the principal partners located in Seattle, is here to testify about. They had these opinions, your Honor.

The Board met and after consideration which is spelled out in the minutes, they determined that the value of the stock of Boeing which was issued should be the market price on November 13, 1959. That was the date when the Board authorized the Boeing management to go ahead and negotiate a deal with Vertol on the basis of three shares of Vertol stock for two shares of the Boeing Company.

Based upon the advice that was given then, the Board then, on April 4, went to that market price, took that market price of 33 and whatever it was, a fraction, and determined the value of those assets.

Mr. Allen, who was then president and chief executive officer of the Boeing Company, will tell your Honor the considerations which went into this conclusion that this was the proper valuation and how his fellow members of the Board reached that conclusion.

There is not one scintilla of evidence adduced here either by the depositions or by stipulation which would indicate that in any way these directors were doing other than to try and decide the fair thing between the debenture holders on one side and the stockholders of the Boeing Company on the other. And I submit that this charge that has been made by Mr. Winer is completely without justification. When your Honor has seen the exhibits and heard from the witnesses, I think your Honor will conclude likewise.

That's all I have to say on the opening, except two minor points. One, the stipulation which your Honor has, the stipulation to the agreed facts, states that there is reserved to both sides the right to object to the materiality and relevance of the exhibits that have been stipulated at the time of trial. I have prepared a list of the exhibits to which we object that have been offered by the plaintiffs. On that basis then I would beg leave just to file that. I don't intend to file it at all. The

other item, which is more of a housekeeping item, Mr. Allen, who has come here at great inconvenience to himself, has to leave this afternoon on a flight and, therefore, if we haven't reached him by 2 o'clock this afternoon --

THE COURT: We will call him right away.

MR. GILLESPIE: We can wait until 2 o'clock, your Honor, because I know the plaintiffs want to go forward with some of their witnesses. But if at 2 o'clock we haven't reached --

THE COURT: Why not call him first and let him get back to Seattle?

MR. GILLESPIE: 2 o'clock will do the job, your Honor.

THE COURT: Why don't you let him take the stand now as the first witness and let him go back to Tacoma?

MR. WINER: It's all right with the plaintiffs. But your Honor, as a matter of personal privilege, there has been a misstatement which I assume Mr. Gillespie didn't mean to make, and I think your Honor has been under that misapprehension for some time.

This complaint was filed by me on August 31, 1966, and I would like to read as to whether the conversion rate is a Johnny-come-lately, or whether it was in the very first one.

THE COURT: You have read that before.

MR. WINER: I have never had a chance to.

THE COURT: I have read it. If it makes you happier, read it. What are you reading from?

MR. WINER: I am reading from the complaint which I filed.

THE COURT: Which paragraph?

MR. WINER: Paragraph 17. The complaint reads as follows:

4.05 of the indenture -- I am referring to paragraph 17 of the complaint which I filed, and then I will read to you from the consolidated complaint.

THE COURT: I do not like colloquies. I told you that before. Don't carry on little private talks.

MR. WINER: I beg your pardon. I was trying to answer Mr. Gillespie's question.

THE COURT: Don't answer him, please. I don't like these private colloquies. My recollection is that you have read it. I have a note here that you have already read it.

MR. WINER: It's in my brief, but I didn't know that I had read it.

THE COURT: Yes, and I marked it in the complaint.

MR. WINER: Then let me just say that it is

in Paragraph 17 and following of my original complaint, and it is in Paragraph 18 and following of the consolidated complaint. It is no more Johnny-Come-lately than I am to the case.

MR. GILLESPIE: Your Honor, in view of the fact that this has been raised, I would read Paragraph 28 of the complaint which is re-alleged in each count.

By virtue of the fore-going, on information and belief the aggregate loss to debenture holders who did not convert was approximately $4 million. My point is that they have from the beginning and throughout, and your Honor's decision is that they are acting only for debenture holders who did not convert.

THE COURT: All right. We will take a five-minute recess.

(Recess.)

THE COURT: Gentlemen, tomorrow morning I have to tell you that I have ten motions on at 10 o'clock so I won't be able to get to you until around 11.

MR. GILLESPIE: Are you ready to proceed, your Honor?

THE COURT: Yes.

MR.GILLESPIE: The defendants, the Boeing Company and Wilcox will call Mr. William M. Allen.

W I L L I A M M. A L L E N, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GILLESPIE:

Q Mr. Allen, what was your occupation in 1960?

A I was president of the Boeing Company.

Q And for what period did you serve as president of the Boeing Company, approximately?

A I became president of the company on September 5th, 1945, and I served as president until, I believe, 1967 at which time I became chairman of the board and carried the chief executive responsibilities with me. Then I served for a year in that capacity, and then I became chairman of the board and the chief executive responsibilities passed to Mr. Wilson who was then the president.

Q And have you now retired?

A I retired on September 30th. I am now given the questionable title of chairman emeritus.

Q But down to September 30th you continued to serve -- that is, September 30th of this year you continued to serve as chairman of the board?

A Right.

Q Now turning more specifically to a date in 1960, the 4th of April, 1960, do you recall whether there was a meeting of the board of directors of the Boeing Company on that date?

A Yes, I do.

Q And in the course of that meeting was there consideration relating to the acquisition by The Boeing Company of the Vertol Company?

A There was.

Q On that occasion or just prior to that board meeting did you have any conversation with any of your staff regarding the matter that was brought up at that particular board meeting on April 4th?

A Yes.

Q Would you tell us what that conversation was and with whom you had that conversation?

MR. WINER: I object to it, your Honor, not binding

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on the plaintiffs.

THE COURT: Overruled.

A I should preface my answer to your question by saying my recollections of the specifics are, well, not as clear as I would like them. They are of a general nature. It was my practice --

MR. WINER: I object, your Honor, to any recollection of a general nature.

THE COURT: Objection overruled.

A (Continuing) prior to a meeting of the board of directors of The Boeing Company to have prepared an agenda of the meeting and send it out to the directors, and then I would go -- well, in that process I would go over the proposed agenda items with various of my vice presidents, including Mr. Haynes, Mr. Prince, the vice president of administration.

One of the items on the agenda for that meeting was the matter -- the determination of fair value of the assets received by Boeing from the Vertol Corporation, that transfer having been made on, I believe it was March the 31st.

Q Four or five days preceding?

A Before, that is right.

Mr. Haynes had been handling the matter of -- he

was the controller of the company -- the financial matters, and the matter of our obligations under the indenture, and he called my attention to the fact that where the Boeing Company issued stock for other than cash that it was the duty of the board of directors to make a determination of fair value of what we received for the stock.

We had a discussion on the subject, and I instructed Mr. Haynes to handle the presentation of that matter at the board of directors' meeting to be held on April 4th.

Q And did Mr. Haynes handle the presentation of that matter to the board?

A He did.

Q On April 4th?

A He did.

Q Could you describe for us in general what occurred at the board meeting of April 4th with regard to this matter?

MR.WINER: I object to it on the ground that the minutes of the meeting are in evidence.

MR. GILLESPIE: Your Honor, a charge has been made here that the directors of this company cheated and defrauded --

THE COURT: He wants to show that the minutes in evidence are correct, according to this witness' recollection.

MR. GILLESPIE: That is correct.

MR.WINER: He wants to show they are correct?

THE COURT: Yes.

MR. WINER: Then I think he may say that.

THE COURT: Well, thank you very much. Your objection is overruled.

MR.WINER: I must take an exception, your Honor.

THE COURT: The law gives you an exception. You don't have to take an exception.

MR.WINER: I know that, too.

(Question read by the reporter.)

A I made a one or two-sentence introductory statement that the matter that was to be considered at that point in the meeting was a determination of the fair value of the assets which the board of directors were obligated to pass upon, and that Mr. Haynes was prepared to go into detail on the various approaches to the matter of fair value, and with recommendations, which Mr. Haynes discussed with our accountant, with our counsel and with our investment bankers.

Q And did the board consider these various possible valuations at that time?

MR. WINER: I object to it on the ground that it is hearsay. I do not think he knows what the board did.

THE COURT: Overruled.

Q Were you present at that board meeting?

THE COURT: He has already told us he was present.

MR. GILLESPIE: Right.

A I was, of course, presiding at the meeting --

MR. WINER: Your Honor, may I make it clear that if he would say what the board said --

THE COURT: I don't want speeches.

MR. WINER: May I explain for the record?

THE COURT: No, I don't want speeches.

MR. WINER: I say it is hearsay.

THE COURT: Well, I don't want argument. Objection overruled. The witness is testifying to a meeting in which he took part and at which he was present.

MR. WINER: The question was, what the board considered.

THE COURT: Please, please, next question.

MR. GILLESPIE: Mr. Reporter, I think you have a pending question.

(Question read by the reporter.)

A Mr. Haynes outlined the various approaches to this problem, namely, consideration of the reproduction cost of the plant and equipment, the approach of capitalization to an earning figure; he pointed out the book value of the assets as carried on the books of Vertol, supplementing that statement with the fact that this was the physical assets only and did not include the drawings and know-how -- I don't think

he mentioned good will, but it was confined to physical value.

He may have given consideration to some other approaches. In any event, those are all outlined in some detail in the minutes of the meeting.

Q And did Mr. Haynes make a recommendation to the board?

A He did.

Q And what was that recommendation?

A He recommended that the fair value be based upon the value of the Boeing stock at the time that a determination was made by the board that we would make -- that we would go forward with a firm offer on t h at basis. That determination was made on September 13th --

Q September?

A November 13, 1959.

Q And did you yourself reach a conclusion with respect to what you believed to be the fair value in this situation?

A I did.

Q And what was that?

A My conclusion was that --

MR. WINER: I object to it on the ground that the conclusion of one director is immaterial.

THE COURT: Overruled.

A (Continuing) the recommendation of Mr. Hanes was the proper approach to the problem.

Q Would you please give us your reasons for reaching that conclusion?

MR. WINER: I object to it.

THE COURT: At the meeting of November 13th, 1959, the sole purpose of the meeting was to determine whether or not the Boeing Company would make an offer to acquire Vertol. That matter was discussed at considerable length in that meeting. Various views were expressed.

Mr. Prince, whom I had delegated with the committee to make an analysis of whether it was advisable or not and on what basis to acquire Vertol, had reduced his recommendations to writing, and this had been provided to the directors present at the meeting.

Q That meeting of November 13th.

A November 13th.

One of Mr. Prince's -- well, his recommendation was that we do go forward, that the offer consist of two shares of Boeing for three of Vertol, with this proviso which

had been insisted upon by Vertol, that if the stock, the market value of Boeing stock had diminished at the time that the transaction was closed to the point where the Vertol directors, or the stockholders would be getting less than an equivalent of $22 per share for their stock, then Vertol would have the right to declare a stock dividend not exceeding 5 percent in order to compensate for the reduction in the price of the Boeing stock.

Several of our directors took a strong position against that proviso, and the other directors seemed to agree to it, and finally a resolution was passed authorizing the offer to be made but without the proviso.

Q The proviso in favor of the Vertol stockholders?

A That is right -- a straight offer of two shares of Boeing for three of Vertol.

Now, that was a determination by the directors of their value of Vertol.

As a consequence, when we came to the determination --

Q On April 4th.

A On April 4th -- it seemed to me that that should be the determining factor, because we never vary from that. We continued right on in the closing on that same basis, and the matter was closed on that basis.

Q. Mr. Allen, did you consider the possibility of

the book value of the assets as shown on the books of Vertol, and, if so, would you tell us what was your reason for not accepting that or not taking that and accepting this value instead?

A Yes. The matter of the book value was one of the approaches that Mr. Hanes had outlined in his presentation, but, as I pointed out, it was confined to the physical assets, namely, plant and equipment that we were acquiring.

My concept of the reason for acquiring Vertol was not based primarily at all upon the matter of the physical assets that we would acquire but rather the acquisition of know-how of the Vertol organization in the helicopter and short take-off aircraft field.

The minutes of the Boeing meetings will show that I took that position, that that was the principal reason for the acquisition. We had decided that we wanted to be in this field.

Now, the question was, would we do it be developing the skills and know-how required in order to be succesful in that field or would we acquire a company that had been in the business for a considerable period of time with their people and start out with a full and rather complete knowledge of the skills and know-how required to be

successful.

It was my view that we could do it more inexpensively by acquiring a company and we would certainly save a lot of time.

As a consequence, the valuation of the physical assets to me was not a proper way to approach the determination of fair value.

Q And you took, as I understand it, the market value at the close of November 13th when you made or authorized management to make the offer?

A That is right, and that, of course, took into account the very factor I am talking about.

MR. WINER: I object, your Honor, to the witness continuing. The question has been asked and he has answered it.

THE COURT: Objection overruled. You must remember, Mr. Winer, that there is a completely deliberate fraud that is charged, and I am going to give them great latitude.

Continue, sir.

Q And in determining this fair value, Mr. Allen, did you take into consideration anything other than these factors of the nature that you have described, what you regarded to be the fair value of this enterprise?

A Well, as I have testified, we went back really to the determination of fair value that the directors made at the meeting of November 13 --

Q Right --

A --1959, and that is what we decided should be the fair value that we should determine.

Q And in reaching this conclusion is it fair to state you had the opinions, in addition, at that time on April 4th, of your counsel, of your outside auditors and of your own investment bankers, Harriman, Ripley, on the subject?

A That is right.

MR. WINER: I will move to strike it. It has been stipulated that those opinions are in the record, and I object to any statement by the witness as to his reliance on them beyond the record.

THE COURT: Objection overruled.

(To the witness) By "short take-off," you mean the know-how, the designing of the plane which would take off or leave the ground on a short, comparatively short runway?

THE WITNESS: Yes, your Honor. That phrase has been generally used for any airplane capable of doing it in less than 2,000 feet.

MR. GILLESPIE: That is all I have to establish, your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. WINER:

Q Mr. Allen, in 1959 and 1960, according to the proxy statements which are exhibits here, you owned 12,315 shares in 1959, and 12,561 in 1960.

Is your recollection approximately that?

A I wouldn't recall, but if the proxy statements say that, then that was it.

Q Do you recall stock options having been given to you in 1959 and 1960?

A I recall stock options having been given to me. Now, whether they were in 1959 and 1960 I cannot at the moment say.

Q Would you accept the statement from the proxies that 3,000 shares were optioned to you in December 1958, and 7500 shares in December 1959?

A If that is what the proxy statement says, I am sure it is correct.

Q Now, you had a Board of Directors consisting of 13 people, did you not?

A It varied from time to time.

Q Well, I am talking about 1959 and 1960.

A I haven't gone back to check that. It could be. If you have checked it, I will accept it.

Q I have checked it, and I appreciate your accepting it.

Now, Mr. Allen, assuming that the Board of Directors consisted of 13, how many of them were employees of the company?

A Out of the 13?

Q Yes.

A Probably six. Now when I say "six," Mr. Egtvedt at that point in time was on the Board but he had become inactive when I became President. He retained the title of Chairman but he had no duties. Whether you consider him an employee or an outsider, we always sort of looked at him as a little of both.

So there were probably five or six, excluding Mr. Egtvedt, who were outsiders, and five or six who were company people, including myself.

Q Would you say that the following were the insiders, that is, in employee categories:

Mr. Beall, Mr. Laudn, Mr. Schaeffer, Mr. Wells, and Mr. Yeasting.

Now, as far as these men were concerned, other than

yourself and Mr. Egtvedt, did you have something to do with fixing their salaries?

A No. The salaries were fixed on our top people by a salary committee consisting of what we call outside directors.

I am sure that was true at the time that you are talking about.

Later when I became less active in the company, I became a member of the salary committee, but the majority has always been -- consisted of so-called outside directors.

Q Did the committee get any information or recommendation from you as to the salaries of these people?

A Yes.

Q What was the nature of the recommendation that you made? I mean in general.

A Well, I in turn, of course, would consult with the organization and I would talk with and get the recommendations from the people that the particular person in mind worked for.

Now, if they worked only for me, reported to me, I would get the views of their associates. I tried to inform myself as fully as possible before making a recommendation to the salary committee, but the salary committee acted when I was chief executive upon my recommendations for

salaries for the top people.

Q And that includes -- the top people includes these names that I have read from the Board of Directors?

A Correct.

Q Now, did you have an incentive compensation plan at that time?

A We did.

Q What was your function in connection with the incentive compensation plan?

A The same function, really, that I have described with respect to salaries.

The incentive compensation plan was designed to reward individuals in the company that were in a position to affect the earnings and well-being of the company, and the recommendations were made based upon an evaluation just as we would do in the case of salaries.

Q And this was -- so that you made recommendations to that committee.

A I did.

Q And that is with respect to these employee directors as well as others.

A That is right.

Q Now, was there a stock option plan?

A There was a stock option plan, that is right.

Q And was it the same committee which passed on who should get stock options and how much?

A Same committee.

Q And it functioned the same way, with your recommendations, is that correct?

A Yes, although it was a little broader in the case of stock options because there was the problem of making it attractive for people to stay with the company, to provide an incentive.

It was somewhat broader, I would think, than salary.

Q The only point I am getting at is that you made recommendations to the stock option committee about these other directors getting stock options and how much?

A I did.

Q One of the outside directors was a Mr. D. A. Forward of the First National City Bank.

Did Boeing do business with the First National City Bank?

A Yes, for many, many years, going away back.

Q Do you recall approximately the amount of borrowing in the period that we are talking about?

A No, I do not.

Q In the prospectus filed with the 1958 debentures it said that Boeing owed the First National City Bank

$30,355,000.

Would that be in accordance with your recollection?

A Yes. I am slightly surprised that it was that low.

Q In other words, from there on you were indebted -- that is, on up in figures you might have been indebted to the First National City Bank at that time, is that correct?

A Yes, I accept the figure.

Q And did First National City Bank have any other business with Boeing?

A They were -- we looked upon the First National City Bank as our lead bank, if that is what you mean.

They made recommendations with respect to the matter of providing ourselves with sufficient financing --

THE COURT: Did you establish a line of credit there?

THE WITNESS: Yes.

THE COURT: What was the extent of that line of credit?

THE WITNESS: Mr. Hanes can tell you. He is the Financial Vice President.

THE COURT: It is all a matter of record anyway.

MR. GILLESPIE: It is in the statement, your Honor.

THE COURT: I know it is.

MR. WINER: What is?

MR. GILLESPIE: I am reading from the prospectus dated July 15, 1958:

"Mr. D. A. Forward is a Senior Vice President of the First National City Bank of New York. The Company maintains a line of credit" --

THE COURT: You see, by carrying on this conversation you just interrupt and take time.

MR. WINER: I apologize. I am sorry. I asked Mr. Gillespie --

THE COURT: All right, there you are doing it again. Please continue.

All this line of questions seems to me most remote.

MR. WINER: It does not to me, your Honor, I beg your pardon.

THE COURT: It seems most remote, particularly in light of the stipulated statement of facts.

MR. WINER: I will ask that the reporter read the last question.

THE COURT: No, next question. If you don't remember it, continue with the next question.

Q Was the First National City Bank your transfer

agent?

A They were on certain issues, but whether -- you would have to tie it down. I probably couldn't answer it. Mr. Hanes can tell you all of this.

Q Were they transfer agent for the common stock of the corporation?

A If I were to guess, I would guess yes, but I would have to say -- I can't say for certain.

Q Were they the paying agent under some of your debentures?

A The same answer.

Q Any other relationships that you know about in which the First National City Bank may have derived --

THE COURT: What is the purpose of this? It is to test this witness' recollection or what? He told you that he left that to the controller of the company. If you have all of that stipulated --

MR. WINER: It is not stipulated, your Honor.

THE COURT: What is not stipulated?

MR. WINER: I say that none of these relationships between First National City Bank and Boeing Company are stipulated.

THE COURT: Isn't it stipulated in the agreed statement of facts?

MR. WINER: I would like to see it.

THE COURT: The date of the registration of the common stock?

MR. WINER: I do not know. That may come in incidentally.

MR. GILLESPIE: I think we can find that, your Honor.

THE COURT: My recollection is --

MR. GILLESPIE: Your Honor, it is right in here in the Annual Report which is a stipulation, which states the Registrar, the transfer agent, the general auditors, general counsel -- the whole thing is all here, in Exhibit 36.

BY MR. WINER:

Q Mr. Allen, one of the directors was Artemus L. Gates. Did he have any business relationship with Boeing?

A Not that I recall, no.

Q Mr. Schmitz was Chairman of the Washington Mutual Savings Bank in Seattle. Did he have any deposits from the Boeing Company or any of its accounts?

A Not from the Boeing Company, no. That is a savings bank.

THE COURT: He was one of its employees, I imagine.

THE WITNESS: Yes.

THE COURT: He was more of a public relations man?

THE WITNESS: Well, he was president of the institution.

Q Mr. William Reed was the President of the Simpson Timber Company. Did Boeing have any business relations with Simpson?

A Not to my knowledge. That is a large company in the Northwest.

Q They might have bought some lumber from Simpson, is that right?

THE COURT: Well, the mock-ups maybe.

A We might have. I don't know. I don't know whether we did or not.

Q Since you -- well, I will skip it.

Did management in about 1959, 1960, 1951 -- or we will limit it to 1959 and 1960 -- have any feeling against dilution of the common stock?

A Any feeling against dilution?

Q Of the common stock.

A Well, I suppose that you can say that no corporation wants to have the value of its stock diluted, but if you are asking me if that was an issue, if we had established policies on it, my answer is "No."

THE COURT: Did you in all of your acquisitions take the possible dilution of the common stock of Boeing into consideration as one of the factors in your deal?

THE WITNESS: That question was asked at the time that we fixed fair value of the stock of the Vertol Company. One director -- and I can't tell you who it was, I don't remember -- asked what the amount would be beyond which if it were lower than that there would be an effect on the conversion factor, and that answer was given, and it appears in the minutes, but there was no discussion of it, as I recall. It was simply an inquiry.

Q I want to read to you --

THE COURT: Do the minutes show that the directors were conscious of that?

THE WITNESS: Oh, yes.

THE COURT: And you yourself were conscious of that?

THE WITNESS: Yes. But our mission, your Honor, was a determination of fair value.

MR. WINER: If I may take one moment to find my copy of some exhibits, please.

(Mr. Winer examines.)

Q I am reading to you from a memorandum of Mr. Hanes entitled, "Boeing Company, 4-1/2% Subordinated

Convertible Debentures," and I will read this sentence to you --

MR. GILLESPIE: Is this an exhibit?

MR. WINER: Yes.

THE COURT: What is the exhibit number?

MR. GILLESPIE: Is it No. 33, Mr. Winer?

MR. WINER: It is one of those, 32 or 33.

MR. GILLESPIE: Perhaps I can help you. It is 33, but I think we ought to have it clear in the record.

MR. WINER: Exhibit 33, and I am reading from page 8, Mr. Gillespie.

I think I read the title.

THE COURT: Please, he told us about this memorandum, with the comptroller present.

Go ahead.

MR. GILLESPIE: Your Honor --

THE COURT: He described it.

MR. GILLESPIE: Yes, your Honor, but I wonder if he has given the date of the memorandum.

MR. WINER: I did not, but I will give it: June 28, 1961.

MR. GILLESPIE: In other words, this is five months -- four months after the Board meeting that has been described here?

MR. WINER: Fine.

MR. GILLESPIE: I mean a year and five months after.

Q (Continuing) "A risk that should be fully understood concerns stock price levels during the period from the date of the call notice to the redemption date. If during such period the market for Boeing moved up to a point fairly close to the $52.25 redemption price, conversions could be forced.

"This would not only defeat our basic objective of avoiding dilution but would also result in our having to capitalize the unamortized debt expense."

Did you hear in 1961 or 1960 or 1959 about a "basic objective of avoiding dilution"?

A That memorandum, who was it addressed to? I may have seen it but I am not familiar with it.

Q It does not, as far as I can tell, have the name of an addressee.

(Mr. Gillespie hands and indicates to the witness.)

A Well, without reading the memorandum, I suppose that this is a memo analyzing, which goes on constantly in our financial situation, and what steps, if any, should be taken to strengthen our financial position, but, as I say --

Q You never knew it was a basic objective to avoid dilutions?

A Well, I think what I was saying to his Honor was generally speaking you do not engage in diluting value of stock unless it is necessary.

Q Mr. Allen, I wish to call your attention to the fact that this memorandum is written in connection with the calling of the four-and-one-half percent subordinated convertible debentures, and the conversion rate at that particular time, according to the computations of your company would have been two shares for $100 or $55 a share.

Now, I ask you whether this refreshes your recollection as to "our basic objective of avoiding dilution."

A No, it does not refresh my recollection because I do not --

Q Have you any recollection of being opposed to having more common shares in the company at $50 a share or otherwise?

A It all depends on the circumstances.

Q Have you any recollection on any circumstances?

MR. GILLESPIE: Your Honor, I wonder if the witness could be permitted to finish that?

THE COURT: Yes.

First I want to call your attention to the fact

that this Exhibit 33 is entitled "A Draft."

MR. WINER: Right.

THE COURT: A draft agreement.

Second, I want to call your attention to the contents of this exhibit. This exhibit shows that an outside financial opinion is sought by those with knowledge in the field, by Harriman, Ripley, as to the effect of the dilution in connection with the redemption of the convertible debentures. You will note that it is on page -- the pages do not seem to be numbered here, but they speak of Harriman, Ripley and they say -- they concluded that the redemption of the convertible debentures would not adversely affect the company's standing with the investment community, nor would it adversely affect the company's ability at some time in the future to acquire long-term capital.

It did indicate, however, that there would undoubtedly be some short-lived discontent on the part of certain debenture holders, but I do not see that this is material at all to this case.

MR. WINER: If your Honor please --

THE COURT: I will let you inquire into it. The witness has testified generally as to the matter, as he did, because of your charge of fraud, and because I

want the record to be complete, but since it did not affect the ultimate point at which the bonds were converted, I do not see how that is material.

I want a complete record made, and for that reason I am permitting this cross-examination because of your charge of fraud, and I have permitted this witness to testify to the extent that he has already done so.

Go ahead.

BY MR. WINER:

Q I now refer to a memorandum dated July 20, 1961 with the name J. E. Prince at the bottom.

THE COURT: What memorandum is this?

MR. WINER: That is one exhibit above or below the other.

THECOURT: Is that Exhibit No. 34?

MR. GILLESPIE: Your Honor, that is --

THE COURT: July 20, 1961?

MR. WINER: Yes.

THE COURT: Exhibit 34.

MR. WINER: Right.

THE COURT: It is entitled: "Subject: Consideration of Call of the Convertible Debentures," by J. E. Prince.

MR. GILLESPIE: May I call your Honor's attention

to this, that July 20, 1961 is again some 16 or 17 or 18 months after --

THE COURT: I recall that. Thank you very much.

MR. GILLESPIE: Right.

Q Now, Mr. Allen, I read to you from this Exhibit 34:

"Mr. Forward was, in general, opposed to this course of action, but in part based on a misunderstanding, I thought, of what the real objective was. At least as far as I was concerned this was not a move made primarily at reducing our long-term debt, but rather to avoid prospective dilution of the equity position of the stockholders.

Now, does that refresh your recollection as to whether conversion of the 4-1/2% debentures was contrary to the policy or the desires of the management?

A No, I have not -- I am not familiar with this letter of Mr. Prince but I assume that it is an interoffice memo which goes on all the while and in which they are considering the pros and cons of doing this or that in connection with our financial security.

Q But as far as you are concerned, it does not recall anything about opposition to conversion of the debentures and dilution of the common stock, is that correct?

A As I say, I just have no recollection of this.

THE COURT: Did you notice the last sentence of that exhibit?

(Reading) "It was accordingly concluded by the three of us that any further consideration at this time was unwarranted."

MR. WINER: Whatever it says, your Honor, I am satisfied.

THE COURT: Well, you have to be satisfied because it is a matter of record.

MR. WINER: Right. So are the parts I am reading, your Honor.

Q Now, I would like to call your attention to Exhibit 32, the memorandum of June 2, 1960, to H. W. Haynes from Paul S. Ford.

Who was Mr. Ford, Mr. Allen?

A Mr. Ford is a financial man at headquarters. He concerns himself principally with tax matters. He works for Mr. Haynes, I believe.

Q I will call your attention to Page 3 of that exhibit, dated June 2, 1960 - this is less than two months

after the meeting of April 4, 1960, Mr. Allen - and I call your attention to Paragraph 4:

"Conversion feature not present (assuming our policy is additional equity investment is not desired.)"

Does that recall anything to you about your desire for additional equity investment?

A No. I think about this time the company was not pressed for funds, so to speak, which is quite a rare situation in an aircraft company.

Later, of course, when we decided to go forward with the 747 and had the SST in prospect, we needed to raise all the money that we could, and we then engaged in the issuance of additional common stock, which probably resulted in what you call dilution.

Q I am not calling it. I am reading to you from your memorandum, Mr. Allen --

A It is not my memorandum.

Q A memorandum of your company.

Now, how much later was this additional needed?

A Well, the very large financing took place in the year 1966.

Q And there was no need in between, was there, between 1958 and 1966?

A I don't recall any public financing.

THE COURT: During 1958 or shortly thereafter wasn't there a substantial layoff at the Boeing plant?

THE WITNESS: In 1958?

THE COURT: 1958 or 1959, fourteen or fifteen years ago.

THE WITNESS: I don't recall,your Honor. In 1958 we were just bringing out our first production jet transport, the 707. Then we moved forward from the 707 to the 727, and I don't recall any substantial layoffs.

THE COURT: Well, didn't you have a large shifting of your employees each year in those days? I think it is 50 percent, isn't it? It is a matter of common knowledge.

THE WITNESS: Yes, it goes up and it goes down.

THE COURT: Where people come in from other states, mechanics, and so on. Perhaps not layoffs, but you didn't replace them by new hirings?

THE WINTESS: In 1969 and 1970 we reduced our employment by some 67,000 people.

THE COURT: Well, at the time that this memorandum is written, on June 2, 1960, the market was poor for the securities, for the debentures, and the question was whether or not you should buy in the bonds at the reduced price and thereby get a possible gain, capital gain, by buying in your own securities.

THE WITNESS: I vaguely recall there was some discussion about this, but the matter you pointed out was abandoned.

THE COURT: This came from your tax people?

THE WITNESS: From the tax man.

THE COURT: You were considering the probable tax saving features?

THE WITNESS: Probably so.

THE COURT: All right.

I don't know what this adds to this case, honestly.

MR. WINER: Perhaps it will add up, your Honor. I hope so.

BY MR. WINER:

Q Is any part of the reason you did not need any money in 1960 that you sold these debentures in 1958?

A I suppose so, because those debentures resulted in our getting just short of $30,000,000. So it helped to that extent.

Q And at the same time you sold a senior issue of non-convertibles?

A No, I don't think we sold any further debentures until --

Q In 1958, at the same time that you sold the convertibles?

A No, that is the only issue I am familiar with in the '50s.

Q Well, we will leave it. It is a matter of record.

Now, Mr. Allen, who were the big stockholders of Boeing in 1959 and 1960?

A OUr stock was very widely held, and I am not aware of any one person that could be called a big stockholder.

Q Mr. Egveldt, who was chairman of the board, owned 18,898 shares; at $50 a share in 1958 - I just explained why I take that number - that would be just under a million dollars; at $30 a share in 1960 it would be just under $600,000; you owned 12-1/2 thousand, and had options of another 10-1/2 thousand, and those would add up to over 20,000 shares --

THE COURT: Is this a question, or a statement of fact?

MR. WINER: I am trying to -- this is embodied in a statement in a question.

THE COURT: Ask the questions.

MR. WINER: He may not be aware of it.

THE COURT: Ask him a question.

Q Were you and Mr. Egveldt and Mr. Lauden and Mr. Beall interested in not having your holdings in Boeing diluted?

A I can't speak for them, because I never disussed it

with them, but I can speak for myself. The matter never entered my head. I was interested in doing the best thing for the Boeing Company, whatever that might be.

Q And for the stockholders in the Boeing Company, is that correct?

A It would be difficult to differentiate between the two.

Q Well, is it difficult to differentiate between the stockholders and the debenture holders?

A They have different interests, yes, but we certainly had the interests of the debenture holders in mind as well. It was our obligation.

THE COURT: Did you notice in this Exhibit 32, on the second page or the third page the statement made by Mr. Ford:

"Most holders" -- that is, of the debentures -- "are insurance companies and other large institutional investors through distress sales." Did you notice th

MR. WINER: I did, but I also noted the sentence which preceded it, which says "specific calculations were not made for the 5 percent sinking fund series of debentures for the following reasons."

It did not refer to the 4-1/2 percent debentures.

THE COURT: Well, I think if you will read further,

it says: "This analysis covers 4-1/2 percent convertible debentures only," although he says that specific calculations were not made for the 5 percent fund, and then he gives these reasons. He cites the position of ownership of the 5 percent sinking fund as being relevant to the market of the 4-1/2 per cent convertible debentures.

MR. WINER: I don't think so, your Honor, but whatever it says, it says.

THE COURT: Okay.

BY MR. WINER:

Q Now, what was your position in 1959 about acquiring Vertol?

A That is, I think, in the record.

Q Well, were you for it or against it?

A You will find in the record a letter dated November 11, 1959, written by Mr. J. E. Prince, in which he outlines the Vertol situation as he saw it and the people on his committee.

I had appointed such a committee to examine it for the purpose of making recommendations as to what action we should take with respect to acquiring Vertol.

You will also find attached to that letter - it should be - my letter on the following day written to the directors transmitting Mr. Prince's memo to them, and in that

letter I take the position that the recommendations of Mr. Prince should be followed, pointing out that this was a close question, and that we might regret it some day, et cetera. But, anyway, I made the recommendation.

MR. WINER: Now, may I address myself to Mr. Gillespie with respect to this exhibit, your Honor?

THE COURT: Privately, don't do it on the record, please.

MR. WINER: Mr. Gillespie --

THE COURT: No, do it quietly. I don't want to hear it. I don't want the witness to hear it. Have a private conversation.

(Mr. Winer confers with Mr. Gillespie off the record.)

MR. GILLESPIE: Your Honor, I have here copies of the document that were referred to by Mr. Allen, and Mr. Winer and I are agreed that those documents should be added to the record.

THE COURT: Have you got more exhibits? I thought we had enough.

MR. GILLESPIE: Well, they just inadvertently were not included in the book, your Honor. They have been available to plaintiffs --

MR. WINER: Since November 2, 1972.

MR. GILLESPIE: We just located them.

THE COURT: Do you want to introduce them in evidence?

MR. WINER: I thought since the witness talked about it that Mr. Gillespie might want to introduce them.

THE COURT: He doesn't want to introduce them. He rests on the witness's testimony.

MR. WINER: All right, then keep it out. I don't want it.

THE COURT: We have got enough exhibits in this case.

BY MR. WINER:

Q Mr. Allen, when did the directors who attended that informal meeting on November 13th receive Mr. Prince's memorandum?

A Well, I can't tell you when the directors who were present at the meeting received it. They could have been delivered, his letter and mine, could have been delivered by messenger - it probably was - because the meeting was rather hurriedly called.

Now, the directors in the East at the time, or just preceding the meeting, Mr. Gates was contacted -- he didn't attend the meeting, and he had received --

MR. WINER: Your Honor, may I ask that the witness answer the question as to when the directors received the --

THE COURT: I think he is trying to answer it.

MR. GILLESPIE: That is what he is trying to do.

MR. WINER: He is telling us about a talk with Mr. Gates, and I just want to know when Mr. Gates got the memorandum.

THE COURT: If he knows.

MR. WINER: If he knows.

THE COURT: Do you know when this memorandum was circulated among all these directors?

THE WITNESS: The only way I know, your Honor, is in the minutes of the meeting that we are talking about it states that Mr. Gates was the only one who had been contacted -- that is, who did not attend, and he had not yet had an opportunity to read the memo of November 11th. And then later he was contacted, and he had read it, and he agreed with the action taken.

Q Now, do you know when the directors present at the meeting received Mr. Prince's memo?

A No.

Q And the memo is dated the 11th.

Do you know whether you transmitted Mr. Prince's memo to the directors?

A I did.

Q And when did you transmit it?

A That letter, I believe, is dated November 12th.

Q Now, then, of the nine directors present am I correct that the following were employee members of the board: Allen, Beall, Egveldt, Lauden, Wells and Yeesting?

A Yes, with the exception of Mr. Egveldt, who was really in retired status.

Q So six of the nine people who attended were employees, is that correct?

THE COURT: Didn't we have this half an hour ago?

Q Now, Mr. Allen, when in your opinion was the decision made to proceed with the negotiations?

A On November 13th the decision was made to proceed on a fixed basis, and that was the basis that was followed throughout the negotiations from then on, and the deal was consummated on that basis.

THE COURT: That is, the two for three basis?

THE WITNESS: That is right.

Q I read to you from Exhibit 22, last page, memorandum of Mr. Prince, which are the minutes you hold in your hand, is that correct, what you have called the minutes?

A I don't know. If Exhibit 22 are the minutes of the meeting of November 13th, then I hold them in my hand.

Q Called "Memorandum of Proceeding"?

A That is right.

Q Now I read you the following from the fourth line

in the last paragraph:

"Mr. Prince on November 16th and prior to a firm decision to proceed talked with Mr. Gates and Mr. Shaffer."

Does that refresh your recollection as to whether there was any firm decision to proceed on November 13th?

A In my opinion a firm decision to proceed was -- the minutes so show -- made on November 13th.

Q You are aware, are you not, when you use the term "minutes" that these are not in the minute book of the corporation?

A It was treated as an informal meeting, but they are the minutes of what took place at the meeting.

Q All right. Now, then --

THE COURT: That apparently was the custom, I take it, that the board of directors sometimes sat as an informal executive committee?

THE WITNESS: Yes.

I can tell you the reason for this if you want to know.

THE COURT: Yes, I would like you to do so.

THE WITNESS: Through the passage of time I couldn't remember why this was treated as an informal meeting.

I had to see my secretary check her calendar pad to determine if I was leaving town, and that was the reason for

the hurried call of the meeting. I did leave town on November 14th, to be gone for over a week to attend the Aircraft Industries Association meeting in Phoenix, Arizona, staying at the Biltmore Hotel.

THE COURT: Not a bad place to stay either.

THE WITNESS: Not bad.

But, at any event, I mention that, and if counsel wants to check my presence there, that is where I was.

And it also followed that I left there and went East to attempt to sell some 707's to Captain Eddie Rickenbacker, in which mission I did not succeed, but, nevertheless, I went back and tried.

Consequently I was going to be away for a period of over a week, and it was decided that I should be present at an important meeting such as this at which a decision was to be made as to whether we were going forward or not.

As a consequence we hurriedly called the meeting and were unable to get notice to several of the directors. One was in Jamaica and one was traveling in Europe, and that is why it was treated as an informal meeting. But it constituted a majority of the board, and a majority of the board approved the action that was taken.

Q Now, what I asked you before was whether the statement in Mr. Prince's memorandum, Mr. Prince on November 16th,

and prior to a firm decision to proceed, talked with Mr. Gates. I want to know if that refreshes your recollection as to whether there was a firm decision on November 13th to proceed?

A There was a firm decision to proceed on November 13th, and if you want to know --

Q That is enough. That is all I want to know.

A Okay. I can tell you why he used those words, if you want to know.

Q No, I don't. I take his words and yours.

Now, I would like to know whether Mr. Prince correctly described your statement on next to the last page of this exhibit:

"Mr. Allen advised that in view of the lack of enthusiasm he believed it would be inadvisable to go ahead with the proposal, that an acquisition of this type was an important matter for the company; that admittedly it was a close question as to the advisability; that there were differing views among the management and within the board, and that under these circumstances he thought the company should not undertake such a venture."

Does that refresh your recollection as to your position on November 13th?

A It reflects my position in the meeting after the

various views had been expressed as set forth in the minutes preceding that statement.

Q Now, in the memorandum of November 11th from Mr. Prince, and in the memorandum of November 13th, signed by Mr. Prince here, with his name at the bottom --

A I think you mean November 11th, don't you?

Q No. What you are calling minutes I am calling a memorandum, which he called it.

A Oh, I see. Very good.

Q Now, I would like to know whether in those two memoranda there is any discussion of stock options of Vertol employees?

A Vertol employees had the stock option. Now, whether they are alluded to in this -- yes, I believe there is some reference to them.

Q Will you find it, please, Mr. Allen.

A Yes. On Page 6, the first --

Q Give the date, please. Which memo are you referring to?

A I am referring to the minutes, what I call the minutes -- you call it a memorandum and I call it the minutes --

MR. GILLESPIE: This is Exhibit 22, your Honor, to identify it.

THE COURT: I have it before me.

THE WITNESS: Of November 13th.

Q Will you give us the line and paragraph.

A It is the first complete paragraph on Page 6, if you have the same type of document.

Q Perhaps I am mistaken, but I don't see anything about stock options of Vertol employees.

A The term is not used --

Q Where is the substance in?

A What Mr. Prince was pointing out, if you will recall --

Q Well, will you --

THE COURT: Let him finish.

MR. WINER: Well, I don't think so, your Honor.

THE COURT: Well, I rule so, whether you think so or not. Let him finish his answer, please.

MR. WINER: All right.

THE COURT: Now, those comments are not right.

A Mr. Prince had been negotiating with the Vertol, the owners of the Vertol Company, and had worked out a tentative agreement, a proposal for us to submit to our directors.

That agreement provided for the two for three exchange, with a proviso that if the Boeing stock, the market

value of Boeing stock went down to the point where on the Exchange the stockholders of Vertol would be getting less than $22 per share, then Vertol could declare a stock dividend up to the point of 5 percent to attempt, you might say, to improve their position.

Now, that proviso was objected to by our directors, and the motion that was made was to approve the recommendation for the two for three exchange, with that proviso eliminated, and that was done.

The stock that Mr. Prince is referring to on Page 6, namely, that had been acquired at $22 per share, he is referring in part, at least, to stock that Vertol employees had acquired by virtue of the exercise of the stock options, and he is explaining why that provision was in the proposal.

Q It doesn't say that except with your explanation, is that correct?

THE COURT: Well, it does say so to anybody who is knowledgeable. It says acquire subject to commitments of acquisition at the rate of $22 a share. What this witness is pointing out is that anybody with knowledge of the background would recognize that this commitment of acquisitions at the rate of $22 a share covered the employees stock.

MR. WINER: Well, I am sorry to tell your Honor that on the list of stock options there weren't any at $22 a

share. It does not refer to that in words, and in my opinion it does not refer to it in substance.

But let us go on from there:

BY MR. WINER:

Q Does it say anything about stock options which are outstanding and have not yet been exercised?

A Not in those terms, that I know of. I would have to read this carefully, reread it to determine if there is such a reference.

Q Was there any discussion at the meeting about outstanding stock options?

A I believe there was, but I couldn't be certain about that. There was a good deal of discussion on this contingency provision which I have alluded to.

Q Which you have told us about?

A Yes.

Q Which are in Mr. Prince's November 11th memorandum?

A And also in the minutes of this meeting.

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b-4

Q I am going to ask you whether you have any recollection of when stock options of Vertol employees first came to your personal attention?

A No, I can't fix any date, and I can't give you any details, but I know that in connection with our consideration of the acquisition of Vertol, that it came to my attention

that there were outstanding stock options at Vertol, and that these would have to be honored by Boeing if we acquire them.

Q Was there any discussion whether you would acquire them or not?

A Well, if we acquired the assets of the Vertol Company and assumed their liabilities, that would follow as a matter of course. And that is what we did.

THE COURT: Was there a merger with Vertol, or was it kept as a separate holding or subsidiary?

THE WITNESS: It was what they call a reorganization in which Boeing acquired the assets.

THE COURT: You acquired all the stock. Did you maintain it as a separate subsidiary or did you merger it?

THE WITNESS: No, we merged it.

THE COURT: Therefore if you merged it you assumed the liabilities?

THE WITNESS: That is right.

BY MR. WINER:

Q Now, did you understand my question, so there will be no doubt about it, whether the stock options were discussed or brought to your attention on or before November 13, 1959? Is that clear that that is my question?

A And the answer to that is yes.

Q Now, then, I want to read to you from Exhibit 29, a letter addressed to Boeing Airplane Company by Harriman, Ripley & Co., Inc., and I read from Page 2, the third paragraph, beginning on the page:

"We are told that at the time of the commencement of negotiations with Vertol shortly after the November 13th decision date, no formal proposal was made for an exchange of Boeing options for Vertol options. The basis for the exchange of options was arrived at later in the negotiations."

I would like to know whether that recalls to your memory when the options were first brought up.

THE COURT: You didn't read the next sentence.

"It is obvious, however, that from the outset Boeing had to be prepared to give options on its shares to all or most of the employees who held Vertol options."

That is the next sentence.

MR. WINER: That is, your Honor.

Now I would like an answer to the question I put, your Honor, if I may.

Would you please reread the question.

(Question read as previously recorded.)

A Well, the matter of the existence of the options was brought up during our consideration before we ever made any proposal, obviously. We were acquainted with this and

recognized that we would have to, if this went forward, take care of those options by substituting Boeing stock rather than Vertol stock on some proper basis.

As far as a formal proposal -- you used that term -- obviously that couldn't be made until we knew that we had a deal.

Q And when was that?

A Well, you can take your own choice.

Q Well, I would like your choice.

A Well, the agreement of reorganization, as they called it, was entered into and approve, I think it was January 18th, was it?

Q It says as of January 18th.

A All right.

The actual conveyance of the property to the Boeing Company and the assumption of liabilities took place on March - what, the 30th or 31st?

Q 31st.

A The 31st, all right.

THE COURT: Are you going to be much longer with this witness, or are we going to let him go back to Tacoma? If you are going to be much longer we will take our recess.

MR. WINER: It took him six and a half years go get here, your Honor. If it takes him a little longer to get back,

I don't think that is so serious.

THE COURT: You want to continue with him?

MR. WINER: Right.

THE COURT: We will take a recess, then, until a quarter after two.

Come back a quarter after two.

MR. GILLESPIE: I just want to be certain that you will finish up in not too long a time after that, I take it, Mr. Winer?

MR. WINER: I think I will.

I don't know what you want to do.

THE COURT: He may not want to ask any questions.

MR. GILLESPIE: That is right.

THE COURT: All right, a quarter after two.

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(Recess for lunch until 2:15 p.m.)

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AFTERNOON SESSION

2:15 p.m.

W I L L I A M M. A L L E N, Resumed.

THE COURT: All right, Counsellor, you may continue cross-examination.

CROSS-EXAMINATION CONTINUED

BY MR. WINER:

Q Mr. Allen, I wonder whether you remember the following statement, which I quote from Exhibit 22, at Page 2, and is attributed to Mr. Yeasting. Mr. Yeasting is quoted as giving four reasons for his position, and he said in number 3:

"This acquisition will reduce the conversion price of our convertible debentures outstanding which will increase the number of shares to be issued if and when the bonds are converted."

Do you remember his making that statement?

A No, but I have no doubt he made it. It is in the memorandum.

Incidentally, he gave eight reasons, not four, if you will turn the page.

Q I think I said four on that page.

A Yes.

Q But I will accept the correction; maybe it was

eight.

Now, let me ask you this: What was Mr. Yeasting's position in the company?

A At that time I believe he was vice-president of finance.

Q And as vice-president of finance, did he know something about the conversion rates and the values and the arithmetic and the accounting that went into the conversion rate?

A I would certainly assume so. He was a very capable man.

Q Now let us go over to the call of the debentures. When for the first time, as far as you know, was there a discussion within the Boeing Company about calling the 4-1/2's of 1980?

MR. GILLESPIE: Your Honor, this is examination into the call in 1966, and I object to it as being outside the scope of the direct examination. My direct examination was limited --

THE COURT: He is following my instructions. I want him to complete all of his examination. I do not want any witnesses to be called back.

MR. GILLESPIE: I understand.

A Yes. Well, my first recollection of discussion about

that call of the 4-1/2 percent debentures arose very early in 1966.

You heard mention this morning about consideration having been given within the company, but I don't remember that; but I do remember discussion of it originated in 1966, because we were then considering the way to go about financing the 747, which would be the greatest -- the largest magnitude of undertaking that the Boeing Company had ever undertaken, and we consulted with our investment bankers. Very early in 1966 we made a journey back here -- Mr. Haynes, Mr. Campbell, one of our directors, and myself, had talked with our investment bankers, and in that discussion the suggestion was made that if we went forward that we might well find it advisable to call the 4-1/2 debentures that you referred to.

Q And what was the discussion as to why it was advisable to call the 4-1/2 percent debentures?

A It revolved around, as I recall, the fact that there would be an extensive conversion of the debentures to common stock under the terms of the debentures that would broaden our stock base, and one of the avenues of providing ourselves with the proper financing to go into this project was the probability that we would issue more stock, and also the fact that it gave the company a larger equity base,

which would strengthen our ability in connection with debentures or fixed indebtedness.

Q And who recommended that?

A As I recall it, our investment bankers -- that was First of Boston, and Harriman, Ripley.

Q Mr. Allen, was that in January or February?

A I think the first discussion was -- my calendar shows that we came back here to have our first discussion with the investment bankers in January of 1966.

Q Was there a meeting of the board of directors on January 31 of 1966?

A I don't know. I can look it up if you want me to.

Q Perhaps we can find it in the stipulation (examining).

MR. GILLESPIE: Your Honor, may I suggest through your Honor that Mr. Winer look at Paragraph No. 96 of the agreed statement at Page 28?

MR. WINER: I thank you. I just found it by coincidence.

No. 96: "If called at trial, H. W. Maynes would testify that on January 31, 1966, there was a preliminary review of possible financing plans at the board of directors meeting held in SEattle"-- and under b, after stating that you discussed in general terms the financing requirements, said:

"No mention was made at this meeting of a call of

the debentures."

Is that in accordance with your recollection?

A I don't recall -- no, I don't recall that specifically, but I have no doubt if it is in the minutes, why, that would be the accurate way to determine it.

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Q So yeu do not question the stipulation, which is to the effect that no mention was made of the call at the January 31st meeting?

A No, I don't question it.

Q Now let us go into February -- well, before we go into February, in January you were aware of --

THE COURT: I do not know the purpose of this.

You are questioning him about facts which have been stipulated.

MR. WINER: Which are what?

THE COURT: Which have been stipulated. I have read the stipulation. I have read it over some time ago, and I just read it again. Anything that you are asking this witness was stipulated.

MR. WINER: Your Honor, if I may respectfully so state, so is all of Mr. Allen's affirmative testimony in the stipulation.

THE COURT: Except that he testified as to its purpose and intent, which is not in the stipulation, and I

permitted that because of your charge that you made that this was a deliberate and intentional fraudulent act. I feel that it is the law that where one is charged with deliberate fraud and larceny great latitude must be allowed by way of intent, to explain why he did things.

MR. WINER: Well, I am sure your Honor means, and you have been so ruling on both sides, direct and cross.

THE COURT: Next question.

Q Now, Mr. Allen, in January did it occur to you that some debenture holders might be injured if they did not know about the call of the debentures?

MR. GILLESPIE: I object to that question. There is nothing in the evidence yet about the call.

THE COURT: I am going to permit it.

(Question read by the reporter.)

A I don't know whether it did or not. I don't recall that I had any such thought.

Q Mr. Allen, you are an attorney, are you not?

A I was; I practiced law for twenty years.

Q And were you familiar with the preparation by the attorneys for the corporation of the notice of meeting, of annual meeting of the year 1966?

A No, I did not participate in that at all.

Q Did you ever see any draft of the proxy notice?

A The proxy notice?

Q I always review the proxy statement that went out in connection with our annual meeting, ir that is what you mean.

Q Yes, that is what I mean, and that had a notice attached to it, did it not, a notice of meeting?

A A notice of meeting?

Q Yes.

A Yes.

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Q And did it have attached to it on the first page a letter from the president of the corporation?

A It very likely did.

Q And did you read it before it went out under your name, the letter?

A Yes.

Q And did you read the proxy statement?

A Yes.

Q The proxy statement is dated February 28, 1966. Did it occur to you that in the letter which you sent out you might notify the debenture holders or the stockholders who were debenture holders that there was a call for redemption?

A No. My thoughts on that would be as follows, if you would like to have them --

Q What were your thoughts in 1966, sir?

A My thoughts would be that if we called the debentures we would proceed in accordance with our indenture that we had with the Chase National Bank which defined the right to call the debentures, and I would rely then upon counsel and our financial people to see that our responsibilities in that regard were carried out.

Q Did you ever discuss with anybody the possibility of sending a letter to stockholders telling the stockholders that

the bonds were called for redemption?

A No, not that I recall.

Q Did you see in the proxy statement any reference to the call of the debentures?

A I don't recall whether there was anything in the proxy statement or not. I haven't read the proxy statement for a long time. It would speak for itself.

Q Would you, as an attorney, regard it as misleading if you sent out on February 28th, or thereafter, under date of February 28th, a letter which was Page 1, attached to a proxy statement, which said: "None of the nominees owns beneficially any of the company's 4-1/2 percent convertible subordinated debentures due July 1, 1980," without stating that these debentures had been called?

MR. GILLESPIE: May I have the question read, if your Honor please?

THE COURT: Yes.

(Question read as previously recorded.)

A My answer is that I do not consciously make misleading statements. From the way you describe it, it does not sound like it is misleading to me even if I made one unconsciously; but, nonetheless, I certainly had no feeling that I was making a misleading statement.

Q Do you think it would be a fairer statement if you

had said: "None of the directors owns debentures due July 1, 1980, which have been called for redemption"?

THE COURT: Objection sustained. Argument. He has already answered. He said that the notice should come in accordance with the terms of the trust indenture, and that it should come from the Chase Bank -- or was it the Chemical Bank? Was it the Chemical Bank?

THE WITNESS: Chase Bank.

THE COURT: The Chase Bank; that they were the ones required by the indenture to give the notice, and he felt that that should be left up to them and to their judgment.

MR. WINER: I would respectfully say that that is a conclusion which I thought your Honor will change at a later date.

THE COURT: Is a what?

MR. WINER: A conclusion.

THE COURT: I have reached no conclusion. I am simply pointing out that your question is argumentative, and he nas already answered. There is no conclusion on anything yet.

Q Now, did you know when this letter to stockholders and the notice of meeting and proxy statement were to go out?

A I don't recall the date. I suppose the letter bears the date.

MR. WINER: I think we can agree that the letter bears a date February 28, 1966.

THE COURT: In Item 107 of the stipulated facts all this information is dated there:

"At this meeting the draft resolution which Mr. Olsen had prepared for the February 28, 1966 meeting of the Boeing board of directors and the tentative time schedule providing for publication of the first notice of redemption on March 7, 1966 and redemption of debentures on April 6, 1966, for review. There was no discussion of possible loss to the debenture holders who might not receive actual notice of the call of the debentures for redemption."

It is all set forth in Item 107 of your stipulated state of facts.

MR. WINER: In order to avoid a further such stipulation, would your Honor please look at stipulation paragraph 132, which says that it was planned to release this letter to stockholders on March 24, 1966.

Now, may I ask a question with respect to that?

THE COURT: Yes. 132?

MR. WINER: L32, yes, sir.

BY MR. WINER:

Q I ask you, Mr. Allen, whether you discussed with anybody the release of a letter to stockholders contemplated

on March 24, 1966, and as to whether that letter should state that if bonds were not submitted for conversion before March 29, 1966, conversion rights would be lost; did you discuss that with anybody?

A I haven't -- I don't recall the letter. If you want to show it to me I could read it.

Q I will be very glad to.

A I am trying to save a little time.

I just want to say that you are talking about matters that I would delegate to Mr. Haynes, to our counsel, to our accountants, and they involved the proper compliance with the terms of the indenture, and I did not get into those details. I had other things that I considered I should be doing.

MR. WINER: I move to strike that part of the answer which says that they complied with the terms of the indenture.

THE COURT: Motion denied. That is his opinion.

Q Did you sign the letter without reading the letter and the papers enclosed with it?

THE COURT: He told you before he read every paper that he put his name to.

MR. WINER: That is all I want to know.

THE COURT: He told you that not once but a number of time. He read every paper he put his name to.

Q Was there any discussion about sending out a special notice to stockholders --

A A special notice?

Q -- with respect to the calling of the debentures?

A A special notice to stockholders?

Q A letter to the stockholders.

A I don't recall any discussion, no.

Q Was there any discussion about inquiring as to who collected coupons on January 1, 1966, to give such people notice?

A I don't recall any such discussion.

Q Do you recall any discussion of any character whatever about giving notice to debenture holders or stockholders other than as provided in the indenture?

A I can recall this, not with the particularity that other people in this room can, but I can recall that as the time was nearing for the expiration of the right of the debenture holders to convert, I was told, and I presume Mr. Haynes or our counsel -- I can't remember -- that quite a number of debenture holders had not exercised their right to convert.

I was also told that inquiry had been made of our counsel as to whether that period of time could be extended, and our counsel had advised that the answer was no; that the

indenture spelled out the terms; that the notice set forth those terms, and that if we endeavored to extend we would face lawsuits, probably, on the part of the stockholders.

Now, I recall generally that discussion. Mr. Haynes or Mr. Olsen who were in the room can give it to you with particularity.

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MR. WINER: I have no further questions.

THE COURT: Any redirect?

MR. GILLESPIE: Your Honor, could I have just one minute?

THE COURT: Yes.

MR. GILLESPIE: I have approximately two questions, your Honor:

REDIRECT EXAMINATION

BY MR. GILLESPIE:

Q Referring to Exhibit 22, which has been marked in the stipulation, Mr. Allen, which are the minutes of the informal meeting of November 13, 1959, and direct your attention to the final page, or Page 7 of those minutes, and more particularly to the sentence which was read to you by Mr.Winer this morning, reading as follows:

"Mr. Prince on November 16th and prior to a firm decision to proceed talked with Mr. Gates and Mr. Shaffer after they had gone over the memo of November 11th, and Mr.

Allen's memo of November 12th, and they were generally briefed on the proceedings of the meeting of November 13th."

Now, referring to those words "prior to a firm decision to proceed," do you know what was being referred to?

MR. WINER: I object to the question. The words speak for themselves, and are in English.

THE COURT: Objection sustained.

What do these words "limited" mean at the bottom of each page of this Exhibit 22? Do you see the word "limited" at the bottom of each page? It says "limited." What does that mean? Limited in circulation, or what?

THE WITNESS: I think that is a Boeing term, your Honor, which is put on certain types of correspondence.

THE COURT: Internal communications?

THE WITNESS: That is right.

THE COURT: Not for general circulation?

THE WITNESS: I don't know what that document is --

THE COURT: This is Exhibit 22. This is a memo of the discussion of the directors or of some of the directors.

THE WITNESS: That is a term which is put on a lot of correspondence for internal consumption.

THE COURT: For internal communications?

THE WITNESS: That is right.

BY MR. GILLESPIE:

Q Mr. Allen, after the decision of the board of directors on November 13, 1959, to offer to the Vertol people the acquisition on a basis of three shares of Vertol for two shares of the Boeing Company, what did the management of the Boeing Company do after they were authorized?

MR. WINER: I object to the form of the question. I won't object to it if the word "decision" is left out of it. The question was asked--

THE COURT: The objection is overruled.

MR. GILLESPIE: Do you have the question, Mr. Allen?

THE WITNESS: I think so.

A The Boeing people moved forward in accordance with the decision that was made at the meeting on November 13th to, hopefully, consummate the negotiations that were authorized. In other words, to come to a conclusion with Vertol, either come to a conclusion or if Vertol said no, why, to drop the matter. But the directors had given a decision and the management moved forward to carry that out.

Q Did you know on November 13th whether the Vertol management would accept the proposal of three for two?

A I would assume they would accept the three for two provision, but, remember, we struck out the reservation about their being able to declare a stock dividend, and I didn't know whether that would kill the deal or not.

Q Do you know when word was received from Vertol that they would accept the deal?

A I think it was very shortly after. I think about November 16th it was.

MR. GILLESPIE: I have no further questions.

THE COURT: Any further questions?

MR. WINER: No, sir.

THE COURT: Thank you, sir. You are excused.

(Witness excused.)

THE COURT: Now we are going back on the plaintiffs' case. We are going to take up the plaintiffs' witnesses?

MR. GILLESPIE: That is correct, in regular order.

MR. WECHSLER: I would like to call Harold W. Haynes as the first witness for the plaintiffs.

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H A R O L D W. H A Y N E S, called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WECHSLER:

Q Mr. Haynes, are you presently employed by the Boeing Company?

A I am.

Q And how long have you been employed by Boeing?

A Since 1954.

Q What positions have you held with Boeing during the period of your employment?

A Assistant to the controller, assistant controller, controller, vice-president of finance and senior vice-president of finance.

Q You were in attendance at the board of directors meeting at which the subject was of the call of the debentures, which meeting was held on February 28, 1966, were you not?

A That is correct.

Q Up to and prior to that meeting on February 28, 1966, was there any discussion that you had as to the requirements of the New York Stock Exchange for publicity regarding the calling of debentures at any meeting, that is, up to and including February 28, 1966?

A Any board meeting?

Q Any meeting of any kind.

MR. GILLESPIE: Your Honor, reference is made in this case to the requirements of the New York Stock Exchange. We are at issue with the plaintiffs' attorneys as to whether these are requirements. I have no objection to the question if it is in terms of a reference to the manual. There is authority that these are just guidelines, that they are not requirements.

THE COURT: All right, I heard you use that description.

A Prior to February 28th I do not recall -- to the best of my recollection, I was not at a meeting where the New York Stock Manual was discussed.

Q What about on February 28, 1966?

A I do not recall whether Mr. Olsen in his presentation to the board mentioned the New York Stock Exchange Manual or not. My recollection is that he did not.

MR. WECHSLER: Your Honor, at this point I would like to read interrogatory No. 8 of plaintiffs' and the answer thereto into the record.

Interrogatory No. 8:

"State whether at the board of directors' meeting of February 28, 1966, or at any time earlier or subsequent

thereto, any statements or suggestions were made or any discussions had by Boeing or any person known to the defendant Boeing relating to those requirements for publication of or press releases concerning the notice of redemption of debentures contained in the listing agreement with the New York Stock Exchange or the rules and regulations of the Exchange concerning such notice of redemption.

"Answer: The requirements for publication of notice of redemption and press releases relating thereto were discussed at the meeting on February 24, 1966, of H. W. Haynes, Harold F. Olsen and Dean D. Thornton, and at the meeting on February 27, 1966, of William M. Allen, H. W. Haynes and Harold F. Olsen, and with the investment banking advisors and their counsel on the telephone prior to the directors' meeting of February 28, 1966, and at the meetings on March 2-4, 1966.

"See answer to interrogatory 5 above."

Q Now, having had Interrogatory No. 8 and the answer thereto read to you, and with particular reference to the statement regarding press releases and the reference in the question to the requirements of the listing agreement and the New York Stock Exchange Manual or the rules and regulations of the Exchange, can you tell me whether you recall whether on February 24, 1966, there was any discussion of press releases

which might be required by the New York Stock Exchange?

A Could I see a copy of that?

(Mr. Gillespie hands to the witness)

A (After examining) Well, based on the answer to the interrogatory, these answers of course were prepared in consultation with Mr. Olsen, Mr. Thornton, Mr. Allen and reflect the recollections of all of those individuals.

The answer obviously says that certain matters were discussed at the meeting on the 24th and the meeting of the 27th, and those are the two dates in the answer prior to the February 28th date, so if the answer to the interrogatory so states, I would agree that the matters in the answer, as indicated in the answer, were discussed in some form.

Q You swore to those interrogatories, Mr. Haynes, didn't you?

A Right. I should have read the answer before I answered your question -- my mistake.

Q Had you read the interrogatory and the answer prior to your swearing to these interrogatories?

A I did.

Q Maybe I can rephrase the question.

Do you know whether you or anyone else at Boeing on February 24, 1966, starting with that meeting referred to

in the answer to interrogatory No. 8, discussed the requirements of the New York Stock Exchange or the rules and regulations of the Exchange concerning the notice of redemption?

THE WITNESS: Will you repeat the question, please?

(Question read by the reporter).

A I think the ans wer to the interrogatory speaks for itself. It discusses the publication of notice of redemption, which is a requirement of the indenture, and press releases relating thereto.

There is no mention whether or not the New York Stock Exchange Manual was or was not discussed, and I think the answer to my question -- to your original question was based upon your inclusion of the reference to the New York Stock Exchange Manual.

Q I think you are right. The question speaks for itself, and the interrogatory speaks for itself, but I draw your attention to the fact that the question asks whether there was discussion regarding the New York Stock Exchange regulations, and there is a reference in the answer that the requirements for publication of notice of redemption and press releases thereto were discussed at the meeting of February 24, 1966, and I would like to have your present recollection as to what the discussion was regarding the requirements for publication of notice of redemption and

press releases was at this meeting, if any -- present recollection.

A My present recollection would be that undoubtedly there was a discussion of the publication of the notice of redemption required by the indenture.

At this point I do not specifically recollect what the discussions were relative to press releases.

Q Do you recollect whether there was any discussion with reference to press releases at that February 24th meeting?

A Based upon consultation with Mr. Olsen and Mr. Thornton, who assisted in the preparation of these answers, which if it says it was, I assume those discussions did occur.

Q I am asking you for your present recollection. We have the answers to the interrogatories, which I have given you to refresh your recollection and read into the record, but I would like your recollection as to whether there was any discussion, first at the February 24th meeting, 1966, regarding press releases concerning the call of the debentures.

THE COURT: Do you yourself have any present independent recollection?

THE WITNESS: I have no present independent

recollection.

Q Would you say that there was no such discussion?

THE COURT: I think we have gone into this far enough.

Q There is a reference to a meeting on February 27, 1966, at which it is indicated you attended. Do you recall whether there was a discussion at that meeting regarding the requirements for publication of notice of redemption and

b-2 press releases at this meeting?

A That was a meeting at Mr. Allen's home, at which time Mr. Olsen reviewed certain resolutions with Mr. Allen. I am sure that during the course of those discussions he did mention the publication requirements of the indenture, and I am sure at that time we did review a press release, which press release covered the results of earnings for the prior year, the year 1965, and in the draft of that press release I would assume -- I would have to go back and check, but I would assume that there was possible mention of the fact that the board would authorize the call of the debentures.

Q Was there a discussion at the meeting on February 27, 1966, of the requirements of the New York Stock Exchange regarding the issuance of press releases on the call of the debentures?

A To my recollection there was not.

Q Was there a board meeting at which the board of directors authorized a call of redemption of the debentures?

A At the February 28th meeting of the board, the minutes of which are in the record, the board did authorize -- my recollection of the wording of the resolution was that the board authorized the management to proceed with a call of the debentures.

Q I will show you a copy of the resolution and ask you whether that appears to be a true copy of the resolution adopted by the board of directors on February 28, 1966, regarding the call of the subject indentures (handing)?

MR. GILLESPIE: Your Honor, may I inquire what exhibit Mr. Wechsler is giving to the witness?

THE COURT: What is the exhibit in evidence?

MR. WECHSLER: I do not think it is an exhibit, your Honor. I think it is referred to in the stipulation, but not as an exhibit (indicating).

A It is a resolution of the board minutes.

THE COURT: Is it in evidence?

MR. GILLESPIE: It is. It is Exhibit 38, your Honor.

MR. WECHSLER: It is the top paragraph on one page of the exhibit (indicating).

THE COURT: The witness is now looking at Item No. 38 of the stipulated statement of facts.

MR. WECHSLER: Do we have an answer?

(Record read by the reporter)

Q Can you answer that question, Mr. Haynes?

A What is it, a true copy?

Q Yes.

A I presume so.

Q I will show you --

A I am looking at this, and if someone --

Q My question is really as to this document. I intend to offer separately the resolution in evidence rather than the entire resolution of the board.

MR. GILLESPIE: We have it in as Exhibit 38, and that is a certified copy.

I think if you are going to be working off it, your Honor, I may suggest if Mr. Wechsler is going to --

THE COURT: I do not see any No. 38 in my set of exhibits here. These are a little twisted up, I think. Show this to counsel (handing to the clerk).

MR. WECHSLER: Your Honor, the reason I suggest, if I may hand up the document that I have shown the witness --

THE COURT: No, if you have an exhibit, let him look at the exhibit.

MR. WECHSLER: It is not as a separate exhibit. That is what I was going to point out, that there is a

lengthy exhibit No. 38, and since the defendants have objected to some of the exhibits contained in the agreed statement as to materiality --

THE COURT: They have made no objection at this point.

MR. GILLESPIE: (After examining) The number precedes the exhibit, your Honor, at the top of that page.

THE COURT: All right.

THE CLERK: It is No. 38.

THE COURT: Now what is the question?

MR. WECHSLER: The witness is now looking at a different copy than I show him, so I ought to withdraw my last question and ask the witness:

Q You have now been shown a portion of Exhibit 38 to the agreed statement of facts, that what certain witnesses have testified to, and I direct your attention to the first paragraph of the fifth page of Exhibit 38, and ask you whether the resolution therein contained is the resolution passed by the board of directors of Boeing at the meeting of February 28, 1966?

A I believe it is.

Q Was there any discussion by any of the directors regarding this resolution?

A Again, I cannot recall whether there was or there

was not.

Q Do you recall whether there was any discussion by any of the directors at the meeting as to the redemption date or the date for expiration of the conversion privilege?

A It is my recollection that Mr. Olsen did review a tentative schedule of certain dates.

Q Did any of the directors make any notes regarding the dates?

A I don't recall.

Q Was a date for redemption or expiration of conversion selected by the board of directors at the February 28, 1966, meeting?

A No.

Q Was there discussion at the February 28, 1966, board of directors meeting by any of the directors regarding the publicity required to be given to the call of debentures?

A By the directors?

Q Yes.

A I don't recall.

Q You don't recall one way or the other, or you don't --

A I don't recall whether any director made any comment on Mr. Olsen's presentation.

Q Are you indicating that Mr. Olsen said something regarding the publicity or the publication requirement?

A Mr. Olsen did discuss a tentative time schedule, and there may have been reference thereto to the publication requirements of the indenture.

Q Do you specifically recall whether Mr. Olsen discussed the publication or publicity requirements concerning the call of the subject debentures?

A The requirements of what?

Q The requirements either of the indenture or of the New York Stock Exchange.

A I would have to refresh my memory, but, as I indicated, I am sure the tentative schedule did have reference to the requirements of the indenture relative to the inclusion of an advertisement in the New York -- or the Wall Street Journal.

Q Independent of any refreshing of recollection, do you now recall whether Mr. Olsen said anything at the meeting regarding the publication requirements of the indenture or the publicity requirements of the New York Stock Exchange?

A As I indicated before, my only recollection would be that in connection with his discussion of a tentative time schedule he would have discussed the publication requirements of the indenture.

I have no recollection of his discussing anything relative to the New York Stock Exchange Manual.

Q Well, I ask you, what can you recall of what Mr. Olsen said regarding the call of the debentures?

A The call of the debentures?

Q What did he say regarding the call of the debentures?

A It is my recollection that he reviewed a time schedule setting forth the dates, the date of the call; the time schedule also showed the expiration date for the conversion of the debentures, and it probably showed the date for the redemption of the debentures.

Q Was the time table that Mr. Olsen presented adopted by the board at the February 28th meeting?

A Adopted?

Q Yes.

A No.

Q Do you remember the dates that were suggested by Mr. Olsen?

A Do I remember them specifically?

Q Yes, without refreshing your recollection. If you don't remember, just say you would not remember without refreshing your recollection.

A Without refreshing my recollection I would not remember.

Q Mr. Haynes, I show you copy of Section A-10 of the New York Stock Exchange Manual, which was in effect at the

time of the February 28, 1966, board meeting (handing)?

THE COURT: That is a stipulated fact -- what number?

MR. WECHSLER: It is No. 43 to the stipulation of what witnesses would testify to.

Q (Continuing) -- and I ask you whether or not by March 1, 1966, you were aware that this section of the New York Stock Exchange Manual existed?

b-3

A I was probably aware.

Q What do you mean when you say you were "probably aware"?

A Well, I am sure that I don't specifically recollect having read it, but I am certainly -- I am certain that at some point in time I had read through the portions of this manual.

Q Well, you used the words, in answer to that question "certainly sure." What makes you sure and certain that you had read this section of the manual by March 1, 1966?

A The only answer I can give you to that would be a natural thing to do.

THE COURT: Did you ever look at this manual with reference to these convertibles after they were called -- up to the time of the call?

THE WITNESS: My recollection would have been that I did look at the manual. In what context or what specific

time I do not recall.

Q Do you remember looking at Section A-10 of the New York Stock Exchange Manual at any time during February 1966?

A I don't specifically recall what date, but, as I indicated, my recollection would have been -- would be that I did at some point.

Q Do you remember whether it was before or after February 28, 1966?

A My recollection would be that it probably was before, but I can't be that precise. It is twelve years ago -- or eight years ago.

Q When is the first time you recall -- specifically now recall reading Section A-10 of the New York Stock Exchange?

THE COURT: Now you have been over this.

MR. WECHSLER: Your Honor, I am going at different time periods. I do not have any idea when this witness, if ever, looked at this manual.

THE COURT: He told us he looked at the manual.

MR. WECHSLER: Well, I am referring to a date --

THE COURT: Do you remember the approximate time that you looked at these regulations, and particularly at this section?

THE WITNESS: As I indicated before, I do not recollect the specific time, but I feel that I probably did

look at the manual some time in February -- certainly in the February, early March time period.

Q Do you recall looking at this after March 1, 1966, specifically and up to date of trial, today?

A Well, certainly I have looked at it.

Q Well, when do you remember first looking at it and reading it?

A Specifically?

Q Yes.

A I have already told you I don't recall.

THE COURT: He has already answered you. Now go on to something else, Counsellor. You have covered it. He has given you the best answer.

MR. WECHSLER: May I say, your Honor, so far as my recollection of the witness' testimony is concerned, I was asking him whether he recalled up to March 1st, and he said he did not remember.

THE COURT: He said in answer to your question that he does not recall when it was specifically. He told you it was about this time. That is the best he can do.

Q Mr. Haynes, on February 28, 1966, was there any general news release issued pertaining to the call of the debentures?

A I think, as I indicated earlier, there was a news

release that was issued after the February 28th board meeting which contained not only information relative to the earnings for the year 1965, but to certain other action taken by the board, including the content of the resolution that you referred to here earlier.

Q Was it issued to the New York City newspapers which circulated financial news in New York City?

A Issued directly to them?

Q Directly or indirectly?

MR. GILLESPIE: May I suggest that this is spelled out in detail, in Paragraph 120 of the stipulation of facts. We worked this over with the plaintiffs' attorneys in every detail as to the nature of this release.

MR. WECHSLER: Your Honor, because we were unable to agree in this area particularly, and on some others, it was specifically agreed in the stipulation that the right of any party to add to or contradict by testimony, including cross-examination, document or argument --

THE COURT: All right, ask him specifically.

MR. WECHSLER: I am asking him, your Honor.

THE COURT: Mr. Haynes, do you recall to whom this statement was issued?

THE WITNESS: No. The responsibility of the news release was in the public relations department, and I do not

know specifically how the release was made.

THE COURT: Did you see the release before it was handed out?

THE WITNESS: I saw a copy of the release before it was handed out.

THE COURT: Was it directed to any particular publication or did it go over the wires?

THE WITNESS: My recollection would be that it would be a general release that would go out over the wires.

Q Do you know whether that news release specifically complied with the requirements of Section A-10 of the New York Stock Exchange Manual which you have before you?

MR. GILLESPIE: I object to that, your Honor.

THE COURT: Objection sustained. We have the manual in evidence.

Do you have a copy of the release in evidence?

MR. GILLESPIE: We do, your Honor.

THE COURT: What exhibit is it?

MR. GILLESPIE: The release of February 28th.

end T-3

THE COURT: All right.

MR. GILLESPIE: Exhibit 40.

Take 4

THE COURT: Whether or not it complied with any rules or met the rules, it is not for him to draw that conclusion. First I have to find out whether or not there was a requirement binding on both. Secondly, if there was, then I will come to the question of whether or not this was compliance.

MR. WECHSLER: We don't contest that this news release complied, your Honor, either way.

THE COURT: You don't?

MR. WECHSLER: Not this news release, so far as it went on that date.

THE COURT: All right.

Q Did the news release contain the dates of the expiration of the right of conversion on the debentures --

MR. GILLESPIE: I object. It speaks for itself.

THE COURT: Objection sustained.

MR. WECHSLER: Your Honor, I would like at this point to read interrogatory No. 9, and the answer thereto, of Plaintiffs' interrogatories into the record.

Interrogatory No. 9:

"State in detail the action, if any, taken in connection with the debentures to comply with the publicity requirements of the New York Stock Exchange as set forth in Section A 10 of its Company Manual and give the names and addresses of

the persons who took such action.

"Answer: The 'publicity requirements' of the New York Stock Exchange as set forth in Section A 10 of its Company Manual did not govern the contractual agreement between Boeing and its debenture holders as to the notice to be given in the event of call of the debentures for redemption. That agreement and notice were govered solely by the indenture. Going being the notice required by the indenture the News Bureau of Boeing issued a press release on February 28, 1966, marked 'For Immediate Use,' which, in part, stated that at the Board of Directors' meeting held that day 'the Company's management was also authorized to call for redemption at a future date all of the company's outstanding 4-1/2% convertible subordinated debentures'."

The remainder of that interrogatory runs for two pages, and I am happy to read the rest of it into the record, but if Mr. Gillespie will stipulate, I will stipulate to make that part of the record, the balance of that interrogatory, rather than read it in.

THE COURT: That is quite a long interrogatory. It is two or three pages. That's a speech.

MR. WECHSLER: That is an answer, your Honor. I only put a short question.

MR. GILLESPIE: Your Honor, I have no objection to

this being included in the record.

THE COURT: All right, give it to the reporter, and he will copy it in.

MR. GILLESPIE: And I would suggest that the reporter copy the answer directly, because I am sure, inadvertently, Mr. Wechsler left off quotation marks in connection with those items; so if it is given to the reporter I am sure it will appear correctly.

THE COURT: All right, give it to the reporter.

Is that the answer that gives all the specifics and everything?

MR. GILLESPIE: No. That is our responses to the requests to admit, your Honor.

(Balance of answer to Interrogatory 9 is as follows:

"The above release was issued as early as possible after Board action at the meeting, to the financial editors of The New York Times and The New York Herald-Tribune, The Wall Street Journal and other major national newspapers, to the Associated Press and the United Press International, to Dow Jones and Company, Inc., to Seattle area newspapers, to aerospace publications and writers and to others. The person in charge of the issuance of the release was Carl Cleveland of Boeing.

"In addition to the foregoing general publicity, there also was published, as called for by the indenture, a notice of redemption on March 8 and 18, 1966, in the Eastern edition of The Wall Street Journal and, although not required by the indenture, in all other editions of The Wall Street Journal which are: Mid-Western, Pacific Coast and South-Western.

"In addition, although not required by the indenture, on March 25, 1966 the News Bureau of Boeing issued a press release marked 'For Immediate Use,' which stated, inter alia, that the final date for the conversion of the debentures was March 29, 1966. This release was issued to Seattle area newspapers and to the Associated Press and United Press International. The person in charge of the issuance of the release was Carl Cleveland of Boeing. Moreover, on March 28, 1966 notice of redemption was published for a third time in all editions of The Wall Street Journal and The New York Times although not required by the indenture.

"The effectiveness of the foregoing publicity is demonstrated by the following facts: (i) financial services and publications used by investors to keep track of call of debentures noticed the call of Boeing's debentures: e.g., the New York Stock Exchange ticker on March 8, 23, 24, 25

and 28, 1966, The Commercial & Financial Chronicle of March 14, 1966 and Standard & Poor's Bond Investments of March 19, 1966; (ii) newspapers carried notice of the call throughout the period prior to the conversion date in the market quotations for the Boeing debentures, e.g., The Wall Street Journal, commencing on March 10, 1966, noted the call through March 29, 1966 for the 14 publication dates involved and The New York Times and The Washington (D.C.) Post likewise noted the call, commencing on March 10, 1966 through March 29, 1966 on the 18 days in the Times and the 13 days in the Post on which quotations were listed; (iii) of $21,514,700 face value of said debentures outstanding on March 8, 1966, $19,970,300 or 92.8% of the outstanding face amount of said debentures were converted during the period following the first notice on March 8, 1966 to and including March 29, 1966."

BY MR. WECHSLER:

Q Were you present at any meeting subsequent to the February 28th board meeting at which the dates for calling and redeeming the debentures were discussed?

A Yes.

Q When was that meeting or meetings?

A There were meetings between March 2nd and March 4th.

Q And was the date for redemption and the final date

for conversion set during that meeting or meetings of March 2nd and March 4th?

A A time schedule, tentative time schedule was discussed throughout that time.

Q At which date between March 2nd and March 4th was the redemption date and expiration of conversion privilege determined and set?

A I think on March 7th Mr. Olsen called the New York Stock Exchange and informed them of the appropriate dates.

Q I show you copy of a letter, which in this copy is undated, addressed to the Chase Manhattan Bank, and purportedly signed by Dean Thornton, treasurer of Boeing, and I ask you whether that appears to be a true copy of a letter sent out on March 2nd by Boeing to the Chase Manhattan Ban.?

MR. GILLESPIE: Your Honor, these letters have all been stipulated to. I don't know why we have to have a loose copy that we have got to compare and see whether it is correct or not. I suggest that the stipulated copy --

THE COURT: Yes.

MR. WECHSLER: Your Honor, there is no exhibit attached to the agreed statement contained in this letter. It was not attached to the agreed statement. I feel I must introduce this. This is a key exhibit --

THE COURT: Is it a new exhibit?

MR. WECHSLER: It is in the sense there is no exhibit. There are quotations from this letter contained in the stipulation, and I will refer you to that quotation, but this particular letter, which is a photostat of the exhibit, is not contained anywhere, so far as I know, in any of the agreed statements.

MR. GILLESPIE: Your Honor, I would suggest before we proceed with what appears to be a photocopy of something, that at least we be able to look at it.

THE COURT: I think so.

Do you want to mark it for identification?

MR. WECHSLER: Yes, I would like to have it marked for identification. I think this would be Exhibit 1.

MR. GILLESPIE: We already have Exhibit 1 in the stipulation. I suggest we have a number higher than the last number which we already have in the stipulation.

MR. WECHSLER: Then this could be Plaintiffs' Exhibit A.

THE COURT: Mark it Plaintiffs' Trial Exhibit No.1, and in that way we will distinguish it from the other exhibits.

xxxxxxxx (Marked Plaintiffs' Trial Exhibit No. 1 for identification.)

MR. GILLESPIE: I have no objection to this document being received in evidence, your Honor, provided it is stipu-

lated that this was mailed March 2, 1966.

MR. WECHSLER: Yes, I will stipulate to that.

THE COURT: Mark that on the top of the exhibit, mailed March 2, 1966, and we will have it on the exhibit itself.

All right, Plaintiffs' Trial Exhibit No. 1 for identification is received in evidence by consent.

(Plaintiffs' Trial Exhibit No. 1 for identification marked in evidence.)

xxxxx

THE COURT: All right.

MR. WECHSLER: Mr. Reporter, would you read back my last question and the answer?

(Question and answer referred to read as follows:

"Q At which date between March 2nd and March 4th was the redemption date and expiration of the conversion privilege determined and set?

"A I think on March 7th Mr. Olsen called the New York Stock Exchange and informed them of the appropriate dates.")

BY MR. WECHSLER:

Q I show you Trial Exhibit 1 and ask you to read that, please. Does that refresh your recollection as to when the redemption date was selected by Boeing?

A As I indicated before, during the week of March 2nd

to 4th we did have meetings and we did discuss a tentative time schedule. I think if you will recall in my deposition the officers of the company had the authority to set the necessary dates. Until such time as that publication was made we could have withdrawn the publication and withdrawn any notice of call.

MR. WECHSLER: Your Honor, I ask that the witness' testimony be stricken as unresponsive to the question and that he be instructed to answer the question.

THE COURT: We will leave it stand. He is repeating what he said before.

Q Who was at the meeting of March 2, 1966, at which you discussed the call of debentures?

A The representatives of the First Boston Corporation. As I recall, there was Mr. Townsend, Mr. Laeri, Mr. Campbell, Mr. Jones.

The representatives of Harriman, Ripley, and I think Mr. Morehouse was there, Mr. Fitzgerald; there were representatives from First Boston Corporation's counsel, Mr. Foshay and Mr. Darrell; representatives from our counsel, Mr. Olsen and Mr. Thornton, the Company's treasurer and myself.

I think that probably includes everybody.

Q This letter was signed by Mr. Thornton, wasn't it?

A Yes.

Q The second paragraph of this letter states:

"The date we have selected is April 8, 1966."

Does that refresh your recollection as to when the date was selected for the redemption of these debentures?

A On the tentative time schedule we had selected that date.

Q Did anyone use the word "tentative" at that meeting of March 2nd?

A Throughout that week we were looking at tentative time schedules.

Q Mr. Haynes, I ask you whether anyone used the word "tentative" in connection with the selection of the date of redemption?

A All dates on the schedule were tentative.

Q In what way were they tentative?

A Because we could back away at any point in time until the publication appeared in the newspaper.

Q Isn't that true of any action --

THE COURT: Wait a minute, this is argumentative. The witness has already answered this. I wish you would get to something else. He has answered this five times, maybe twenty times.

B-3

Q Were the requirements of Section A 10 of the New York Stock Exchange Manual discussed at the meeting of March

2, 1966, at which the date for redemption of the debentures was selected, whether tentatively or finally?

A I don't recall whether there was a discussion of the New York Stock Exchange Manual. Very possibly there was. I think the interrogatories say there were, and those were prepared, as I indicated, in consultation with people who were at the meeting, and if the interrogatory says there were discussions, I would have to go along with that.

Do you want me to refer to the interrogatory?

THE COURT: No. Don't volunteer anything.

Next question.

Q Was a general news release issued on March 2, 1966, to newspapers in New York of general circulation setting forth that Boeing had established the cutoff of the conversion date and the redemption date for its debentures?

A My recollection --

MR. GILLESPIE: Could I have that question read? I couldn't hear Mr. Wechsler.

(Question read by the reporter.)

THE WITNESS: Do you want me to answer that question now?

MR. WECHSLER: Yes.

A My recollection is that there was not a general press release made on March 2nd.

Q Was there any press release made on March 2nd, dealing with the call of the debentures?

A I don't think so.

Q Was there a release issued to Dow Jones & Company?

THE COURT: He said he doesn't think there was any release. That includes Dow Jones.

Go ahead, next question.

MR. WECHSLER: I assume, then, your Honor is satisfied that there was no release to the financial press?

THE COURT: I am not satisfied of anything. I am simply telling you what the witness testified to.

MR. WECHSLER: I am not sure his testimony is complete in that regard. I want to ask one more question in that regard.

THE COURT: Please. Don't you think we have reached the limit on that?

Q Was there a general news release issued on March 2nd, 3rd, 4th, 5th, 6th or 7th by Boeing regarding the call of the debentures?

A My recollection would be that there was not.

Q Was the New York Stock Exchange notified on March 2nd that Boeing had decided on the redemption date for the debentures and the cutoff of the conversion period?

A Mr. Olsen was the one that was communicating with

the New York Stock Exchange. I don't know what specific conversations he had with the Exchange and on what dates.

Q You don't know whether they were or were not notified on March 2nd whether Boeing had selected --

THE COURT: He said it was taken care of by Mr. Olsen.

MR. WECHSLER: Mr. Olsen might hav e told him, your Honor.

THE COURT: Please, that would be hearsay.

Let's go ahead now, please.

Q When did Boeing after February 28, 1966, if ever, issue a general news release regarding the call of debentures?

A A general news release?

Q Yes.

A You mean what, to the wire services?

THE COURT: To anybody.

THE WITNESS: It is my recollection there was a general press release or news release issued on March 25th.

Q Was that issued to New York newspapers?

THE COURT: Is that the one you told us was issued by your public relations man?

THE WITNESS: No, that was February 28th. This news release would have been handled through our public relations department.

THE COURT: This last one?

THE WITNESS: Yes.

THE COURT: That is what I ask you.

THE WITNESS: Right.

THE COURT: He has already testified to this.

MR. WECHSLER: I don't know whether I got an answer to the last question.

THE COURT: Yes.

THE WITNESS: Released through our public relations department, and presumably it would have gone to all wire services.

Q Was it released to New York newspapers?

THE COURT: He said all wire services.

MR. GILLESPIE: Your Honor, may I suggest that Paragraph 140 of the agreed statement spells this out in detail, and states:

"On Friday, March 25, 1966, the News Bureau of Boeing issued a News Release marked 'For Immediate Use,' which stated, inter alia, that the final date for the conversion of the debentures was Tuesday, March 29, 1966. If called at trial, J. H. Newland would testify that this release was issued to Seattle area newspapers and to the Associated Press and United Press International. A copy of the release is annexed hereto as Exhibit 50."

MR. WECHSLER: I asked the question for a specific reason, because of the specific requirements of the Stock Exchange Manual, but I won't pursue it any further.

THE COURT: All right. Next question.

Q Mr. Haynes, other than the general news release of February 28th and the general news release of March 25th, that you have testified to, were there any other general news releases issued by Boeing with respect to the call and the redemption of the debentures?

A To the best of my knowledge -- what period are you talking about now?

Q Any time between February 28th, when the board of directors met, and any time thereafter?

A Up through the 28th release and the March 25th release?

Q Up through the final redemption date?

A To my knowledge there was not.

MR. WECHSLER: I have no further questions of this witness, your Honor.

THE COURT: Do you have any questions, Mr.Gillespie?

MR. GILLESPIE: Your Honor --

THE COURT: I want to adjourn today a quarter to four.

MR. GILLESPIE: I was wondering whether we couldn't adjourn until tomorrow morning with this witness. I may be

able to limit my cross-examination very decidedly.

THE COURT: All right, eleven o'clock tomorrow morning.

- - -

(Whereupon an adjournment was taken to Thursday, November 16, 1972, at 11:00 o'clock a.m.)

- - -

WITNESS INDEX

Name	Direct	Cross	Redirectt	Recross
William M. Allen	47	59	111	
Harold W. Haynes	115			

EXHIBIT INDEX

Plaintiffs	Identification	In Evidence
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TRANSCRIPT OF PROCEEDINGS BEFORE RYAN, D.J.
ON NOVEMBER 16, 1972

slx

463a 149

WILLIAM R. VAN GEMERT, et al.

-vs- 66 Civ. 1820

THE BOEING COMPANY (formerly BOEING AIRPLANE COMPANY) et al.

- - -

New York, New York,
November 16, 1972,
11:00 a.m.

THE COURT: All right, we will continue now. We had a witness on the stand when we adjourned. Let him resume the stand.

Mr. Haynes.

H A R O L D W. H A Y N E S, Resumed:

THE COURT: We had reached the stage where you wanted to decide whether to ask one or two questions?

MR. GILLESPIE: That is correct, your Honor.

I understand that the plaintiffs have finished with Mr. Haynes, and I have overnight reviewed my understanding of his testimony yesterday, and I have also reviewed the agreed statement of facts, and I have concluded that we have no questions.

THE COURT: All right.

MR. WINER: If your Honor please, I don't know where Mr. Gillespie got the impression that we were finished

with Mr. Haynes.

THE COURT: Well, he got it from what you said.

MR. WINER: Nothing I said, your Honor. And I wish to have it noted on the record at this point that if Mr. Haynes is not to be called again I regard the case of plaintiffs as severely prejudiced by my inability to cross-examine.

THE COURT: You have not finished cross-examination?

MR. WINER: No.

THE COURT: Go ahead, cross-examine.

MR. GILLESPIE: I take it he is being called as the plaintiffs' witness?

THE COURT: I don't know what he is being called as. I thought you had completed.

MR. WINER: Sir?

THE COURT: I thought you had completed yesterday afternoon.

MR. WINER: No, sir, I had not asked Mr. Haynes any questions.

THE COURT: You were doing the interrogation, weren't you, Mr. Wechsler?

MR. WECHSLER: Yes, on the Stock Exchange issue.

THE COURT: Well, I am not going to allow two of

you, as I told you at the beginning, to examine seriatim. If you have any further questions, you ask it through associate counsel who conducted the examination. I am not going to subject any witness to direct or cross-examination by two attorneys representing the same party. I told you that at the outset.

Now, if you want to consult with your associate, you may do so. As for any further examination - I don't care on what subject it is - it has to be conducted by one attorney who started the examination. We are not going to hav e a relay of attorneys representing the same party conducting a series of examinations. I am not going to do that.

MR. WINER: Your Honor, may I reiterate: I think at this point and perhaps a clearer understanding by your Honor of the problem --

THE COURT: Please don't worry about my understanding of the problem. You explained it to me during your opening statement. I told you before we began the trial that once a witness takes the stand, this being a non-jury case -- we don't have a jury here -- that witness's testimony is to be exhausted on all matters that he can testify to in the case, and that I would not permit his recall unless there was some substantial reason later produced.

MR. WINER: Right.

THE COURT: I also told you, and I made it quite plain, and I might make it clear to you again, that I will not permit two attorneys to cross-examine or examine either on direct or cross the same witness where those two attorneys represent the same litigant, period.

MR. WINER: Your Honor, the last words that you mentioned "represent the same litigant" is a part of the issue. We are here because it is a class action, and each of us originally represented different people.

Now, your Honor has appointed a committee --

THE COURT: Appointed what?

MR. WINER: You appointed three attorneys as a committee.

THE COURT: I said that you could decide when these cases were consolidated amongst yourselves as to how the work should be distributed amongst you. I said that as to one feature of the matter one might examine the witnesses; another one might prepare motions for inspection; another one might take depositions. I didn't like to appoint lead counsel. But at no time, I said, would there be duplication of counsel representing the same parties.

MR. WINER: That is precisely what we have tried

to do, is to avoid duplication, and Mr. Wechsler has concentrated on one issue and I on others, and it is going to be an inadequate record, in my opinion, if we have to conduct it this way.

Now, I should be very happy to accept your Honor's suggestion because I have no alternative, and I shall write out some questions --

THE COURT: I thought you had already consulted with your associates; that you were going to do so when we began this trial, and I made this quite plain to you before you began presentation of evidence.

MR. WINER: I couldn't very well write out the questions before hearing Mr. Haynes' testimony.

THE COURT: Well, do you want to consult with him now? You had overnight.

MR. WINER: I would like to give him some questions.

THE COURT: Well, give him anything you want.

MR. WINER: I would be very glad to do so, but I can only do one thing at a time.

THE COURT: What do you mean you can only do one thing at a time?

MR. WINER: I mean, as long as we are discussing I cannot write out the questions.

THE COURT: You don't have to write out the ques-

tions; you can sit alongside of one another and he can sit down and conduct his cross-examination or examination from a sitting position, and you can be alongside of him. You don't have to write out anything.

MR. WECHSLER: Your Honor, I would like to take exception to your ruling and to suggest that it was never our intention to duplicate, and we understand your Honor's ruling not to have a witness recalled, and we never intended to do so --

THE COURT: Counsel, I told you at the beginning of this trial that I would not permit the plaintiff to examine witnesses by a series of counsel. I made that quite plain to you at the beginning of the trial. Now, you can have Mr. Winer seated right alongside of you; you can conduct your examination seated, we have no jury here. You can take your time. You don't have to write out any questions. You can tell him what subject matter you want him to discuss and you can go ahead and discuss it and pursue that interrogation.

MR. STEINMAN: Your Honor --

THE COURT: I thought you left earlier.

MR. STEINMAN: Unfortunately my wife is ill, and I have to leave this afternoon to take her to the doctor, but I didn't have the opportunity yesterday to remind your

Honor that this case from the very beginning was handled a little differently than most actions of this kind; and if your Honor would recall you suggested that a committee of attorneys represent all of the cases that were commenced here and cases that were brought in from other parts of the country.

I might say that since that time that procedure, which has worked out very well for us, has been followed by other Judges in this court successfully.

To give you one illustration, in the Texas Gulf Sulphur cases --

THE COURT: Counsel.

MR. STEINMAN: May I finish?

THE COURT: Counsel, I made this suggestion primarily because I don't like the designation of lead counsel, and, secondly, because you could not agree on who should be the lead counsel, and I said there is no need for it, and that there should be a fair division of work among each one of you to lighten the burden of each one of you, and to work it out to your own advantage.

b-2 MR. STEINMAN: We are following out your Honor's suggestions, I think, and I can safely say that Mr. Winer, Mr. Wechsler and myself, during the years this case has been pending, have worked together harmoniously, and, I believe,

successfully.

Your Honor then entered a pretrial order, number one, which among other things, my recollection is, stated and directed with respect to a trial we did have to designate the attorneys who were going to supervise the trial of the action.

THE COURT: That is right.

MR. STEINMAN: And what we did, in what we thought was the best interests of the prosecution of the case, was to have Mr. Wechsler and Mr. Winer, each one, supervise two different causes of action.

THE COURT: Counsellor, we had all this yesterday. I don't want to hear it again.

MR. STEINMAN: Well,your Honor, I merely want to finish by saying, if you will permit me to, that it is very important to our case, since Mr. Winer and Mr. Wechsler are acquainted with their particular cases of the operation, that extenuating circumstances, in my opinion, exist which, at least, with respect to one witness, with respect to the witness Mr. Olsen, who I understand will be on the stand --

THE COURT: Well, we do not have Mr. Olsen on the stand now.

MR. STEINMAN: Sir?

THE COURT: Olsen is not on the stand now.

MR. STEINMAN: No, but with respect to Mr. Olsen, and perhaps Mr. Haynes, that your Honor permit Mr. Wechsler and Mr. Winer just in those instances to cross-examine individually. I am sure it will not be a burden or prejudice --

THE COURT: No, I am not going to do that, but you might sit alongside of counsel on his right-hand side or left-hand side and consult; the three of you can sit together and consult. You can discuss it and assist each other any way you want, but I will not permit three lawyers to examine or cross-examine the same witness, period.

Now, if you want to sit down, sit down. Move over, counsel, and let him sit alongside of you.

end 1

H A R O L D W. H A Y N E S, Resumed:

DIRECT EXAMINATION CONTINUED

BY MR. WECHSLER:

Q Mr. Haynes, do you recall testifying at a deposition in connection with this action?

A Yes.

Q I would like to read to you a question and answer and ask you whether that was your testimony, to the best of your recollection?

THE COURT: Counsellor, identify the deposition, the date, whether or not it is on file. Is the deposition on file, or is it one of the exhibits?

Take 2

MR. WINER: I believe it was never filed, but here are the originals.

THE COURT: It should be filed; the rule so provides.

MR. WINER: May I file them now, your Honor?

THE COURT: It is kind of late to do it. What are you filing now?

MR. WINER: The deposition of Harold W. Haynes pursuant to notice and stipulation, dated April 4, 1969, and held on April 9, 1969, at the offices of Davis, Polk and Wardwell.

THE COURT: Was it on more than one day?

MR. WINER: It was continued the next day after rulings by your Honor.

THE COURT: How many pages on the first day?

MR. WINER: On the first day there were 106 pages of testimony, and on the second day there were 12 pages of testimony.

THE COURT: Do I understand now you are simply marking this deposition as an exhibit for identification?

MR. WINER: That is agreeable with me.

THE COURT: No. Is that what you want?

MR. WINER: Yes.

THE COURT: Do you want to offer this in evidence

or do you want it marked for identification?

MR. WINER: For identification.

THE COURT: It is two volumes?

MR. WINER: It is two volumes.

(Plaintiffs' Exhibit No. 2 was marked for identification.)

xxxxx

MR. WINER: This is the Olsen deposition(indicating).

THE COURT: Do you have a copy for the Court?

MR. WINER: Either the one that is being marked or this one.

THE COURT: You may hand me the one that has been marked for identification. We will call it Trial Exhibit 2, to distinguish it from the pretrial order exhibits.

Go ahead, counsellor.

BY MR. WECHSLER:

Q Mr. Haynes, did you testify as follows on the deposition just referred to by you, at Page 37, Line 4 --

THE COURT: Do you recall being deposed on that day?

THE WITNESS: Yes.

THE COURT: May I make the suggestion, there is a way to prove this which would make the record better, more understandable --

Do you recall at that time you were asked this question and made this answer.

MR. WECHSLER: Your Honor, I accept your question.

Q "Q. Was any information furnished to the directors so far as you know prior to February 28, 1966, with respect to the redemption of the debentures other than what you have already told us?

"A. No. "

A Are you saying that is what the deposition says?

Q Do you recall having so testified?

A Yes, I recall that.

Q Was there any discussion by Boeing management before February 24, 1966, to recommend the calling of the debentures?

THE COURT: That is not a question. Is this another question?

MR. WINER: This is another question.

THE COURT: I asked you to follow a format. I wish you would do it. Tell us what you are reading from and the line -- were you asked this question and did you make this answer --

MR. WECHSLER: Your Honor, this question is not from the deposition. I am finished with the deposition question.

THE COURT: I asked you whether you were reading from the deposition and you said you were.

MR. WECHSLER: The first question I asked was from the deposition.

THE COURT: This is not from the deposition?

MR. WECHSLER: No.

Q Was there any decision by Boeing management before February 24, 1966, to recommend the calling of the debentures?

A You say a decision?

Q Yes.

A There was no decision.

THE COURT: Didn't we have this all yesterday? Didn't the former president testify?

MR. WINER: Are you addressing me?

THE COURT: No. The examiner. Haven't we gone over this before?

MR. WECHSLER: I would like to consult with my co-counsel.

No.

Q Mr. Haynes, did you tell the board meeting of Boeing on April 4, 1960, what figure would be put on the books on the pooling of interests?

A In my presentation to the board a discussion was made of the fact that the transaction would be accorded a pooling of interest structure as far as the recording on the books, and I did mention a certain book value. If you will

give me a copy of the minutes of that board meeting, I think those numbers are in the minutes.

THE COURT: What is the exhibit number of that meeting?

MR. GILLESPIE: No. 25, your Honor.

Q Were the figures you gave as to book value $13,799,000 on September 30, 1959, and approximately $13,460,000 on March 1, 1960?

A If that is what the minutes say.

Q Pardon me. I misspoke myself. I meant March 31, 1960.

A If you are reading from the minutes, the minutes, I presume, are accurate.

THE COURT: What exhibit did you read from?

MR. WECHSLER: No. 25.

THE COURT: What page?

MR. WECHSLER: The fifth paragraph, at the top of Page 6.

Q Did you tell the board that the adjustment would be down to $12,435,000?

A Do the minutes say I did there?

THE COURT: The witness would like to refresh his recollection by looking at the minutes. Do you have a copy?

MR. GILLESPIE: I have a copy of them here, your

Honor.

THE COURT: Let him look at them.

THE WITNESS: Well, the minutes indicate that I referred to the book value figures and then advised the board that certain adjustments would be made to these minutes when recorded on Boeing's books, and then went on into a discussion of the difference between book value and fair value.

THE COURT: You are reading from what exhibit number?

THE WITNESS: Twenty-five, I think, is the exhibit number.

THE COURT: Page number?

THE WITNESS: Page No. 6.

Q Did you say that the adjustment would be more than one million downward?

A It is my recollection that I indicated that in certain instances Vertol handled the accounting for certain assets on a tax basis which was different from the method of accounting followed by Boeing, and that the adjustments would be basically to conform Vertol's accounting to that of Boeing's. My recollection is that I did not mention any specific figure.

b-2

THE COURT: What was the difference in the method of accounting? One did it on a cash basis and another on an

accrual basis?

THE WITNESS: The principal difference is that Vertol, for accounting purposes, did not use the same depreciation method that they did for tax purposes. Boeing's policy was for accounting purposes to follow the same depreciation method that was used for tax purposes. Vertol's accounting policy, on the other hand, was to use a different depreciation method for book purposes as opposed to tax purposes.

In the consolidation of the accounts we conformed Vertol's accounting to that followed by Boeing.

Q And did you tell them that the book value could not be used for the purpose of computing Pennsylvania State Excise taxes payable?

A I did. My recollection was that I indicated that the values for Pennsylvania State excise tax related only to specifically identified values of tangible assets.

For example, it did not include cash in the banks, it did not include accounts receivable, it did not include the assets of Vertol outside the State of Pennsylvania, such as the assets of Allied Research, a subsidiary of Vertol, nor did it include the assets of Vertol that was domiciled in Canada.

Q Did you tell them that the assets of Vertol for the

purposes of the Pennsylvania State tax would be $9,000,000?

A As I just indicated, after explaining the substantial difference between the assets for Pennsylvania State tax and the assets per the books and the fair value of the assets of Vertol, I did not think it relevant to mention a specific figure. The answer is, I did not.

Q Did you tell them that the Pennsylvania State excise tax did not include the liabilities of the company?

A I probably did, because it did not. The computation did not include the liabilities or did not provide for the deductions of liabilities, would be the best way to state it.

Q In other words, the $9,000,000 was before deducting any liabilities?

A I think as I answered, the $9,000,000 represented the book value of specified assets that are called out on the front of the return; did not include all of the assets of Vertol; it included only certain tangible assets of Vertol, which assets are domiciled in the State of Pennsylvania. It has nothing to do with book value; it has nothing to do with fair value.

MR. WECHSLER: We have no further questions of this witness.

THE COURT: Do you want to consult your other

associate counsel in this matter now?

MR. STEINMAN: No, we have discussed it, and I have no questions.

THE COURT: Do you want to consult further with counsel before he completes his examination of this witness, Mr. Winer?

MR. WINER: No, your Honor; but I think I should state that I find it impossible to conduct the examination under these circumstances.

THE COURT: I don't see that it is impossible, a lawyer as bright as you, who worked in the case preparing it for six years.

Any cross-examination?

MR.GILLESPIE: I have just one question.

CROSS-EXAMINATION

BY MR. GILLESPIE:

Q Mr. Haynes, at this meeting of April 4, 1960, that of the board of directors of the Boeing Company as to which you have just been interrogated, did you report to the board that you had received the opinions and the recommendations of the company's outside auditors, Touche Ross, and the company's outside counsel, Holman, Marion, and Harriman, Ripley, investment bankers?

A I did.

MR. GILLESPIE: No further questions, your Honor.

REDIRECT EXAMINATION

BY MR. WECHSLER:

Q Would you, Mr. Haynes, please look at the minutes and see whether you told the board that you had an opinion from Touche, Ross?

THE COURT: What minutes do you want him to look at?

MR. WECHSLER: The same minutes he has been looking at.

THE COURT: That is, Exhibit 25?

MR. WECHSLER: Yes, your Honor.

A The fact that I at the board meeting mentioned or stated or reported to the board that I had an opinion from Touche R oss was inadvertently left out of the minutes. I did have in hand at the meeting an opinion of Touche Ross dated the same date as the board meeting.

THE COURT: Which was February 28th?

THE WITNESS: I think it was April 4th. A copy of the opinion, your Honor, is in the record.

THE COURT: What exhibit is that?

MR. GILLESPIE: It is Exhibit 30, your Honor.

THE COURT: Exhibit 30, dated April 4, 1960, addressed to you as controller?

THE WITNESS: That is correct.

THE COURT: Incidentally, that photostat is not very legible.

MR. GILLESPIE: I understand that directly under that copy is a clearer copy.

BY MR. WECHSLER:

Q Mr. Haynes, I show you Exhibit 30, and direct your attention to a notation in the upper right-hand corner, indicating that it was received on April 28, 1960?

A Yes. By the way, you will see it was received by Holman, Marion, not Boeing, on that date. I received it on April 4th. That stamp is a Holman, Marion stamp.

THE COURT: Those are the Seattle attorneys?

THE WITNESS: Seattle attorneys' office.

Q Do you have the copy that you received of this exhibit?

A Do I have it here? I don't have that specific copy that I had at the board meeting, but I assume a copy was furnished. Whether that was the exact copy I had I do not know.

Q Does Mr. Gillespie have the original copy which you received?

THE COURT: Let's not make a mystery of it.

Is the original Touche Ross report here?

MR. GILLESPIE: Your Honor, we have not been able

to locate the original Touche Ross report. That is the reason we used the copy that had been furnished on April 28th to Holman, Marion.

THE COURT: The copy is the original one?

MR. GILLESPIE: We have Touche Ross's copy of that here in court.

THE COURT: Is anybody going to testify from Touche Ross?

MR. GILLESPIE: Yes.

THE COURT: Counsel is going to produce the copy from Touche Ross.

MR. GILLESPIE: I have the file copy here now of Touche Ross, if counsel for the plaintiffs desire it.

b-3 Q Mr. Haynes, is it a coincidence that this letter is not mentioned and that you do not have the original?

A No, it is not a coincidence. In fact, I did review by reason of the question raised in plaintiffs' brief the handwritten minutes that the secretary took on April 4th, and in those handwritten minutes it specifically indicates that I

end 2 did mention the opinion of Touche Ross, so it is no coincidence.

Q Did you bring those handwritten minutes with you to court?

A Mr. Gillespie has them.

MR. GILLESPIE: I have them.

Take 3

MR. WECHSLER: May I see them?

THE COURT: Are they marked as an exhibit?

MR. GILLESPIE: They are not marked as an exhibit.

THE COURT: Well, if you want to produce them, let us mark them for identification.

(Marked Defendants' Trial Exhibit A for identification.)

xxxxx

THE COURT: You had better state on the record what Trial Exhibit A for identification is.

MR. GILLESPIE: This is a sheaf of handwritten notes, bearing on the cover page the title "Work Notes of 4/4/60 Minutes of Board Meeting to be Filed."

And it thereafter contains a typewritten sheet marked "Agenda," and then a series of handwritten notes. The total number of pages are 16.

(Defendants' Trial Exhibit A for identification handed to counsel for plaintiffs.)

THE COURT: While counsel is looking at this exhibit for identification, Mr. Wechsler, I do note that in the minutes of the deposition taken of this witness, Harold W. Haynes, on April 4th, although the interrogation appears to have been had by Mr. Winer, that you are noted as being present throughout the examination.

MR. WECHSLER: I will comment on that, if you wish,

your Honor.

THE COURT: No, I don't wish you to comment. The record speaks for itself.

It also notes that you were present, too, Mr. Steinman.

MR. STEINMAN: That is correct.

THE COURT: So neither one of you three were strangers as to what went on in this deposition.

(Counsel examine exhibit.)

THE COURT: Gentlemen, I suggest, since you are all familiar with this matter, this is no time to take up the time of the Court. These documents were readily available to you before today if you had asked for them.

All right, do you need any more time now before you put any more questions? If you do I suggest you go now to some other topic and you can take this up later.

MR. WECHSLER: Your Honor, I wish to point out that this document was never brought to our attention until just now; as far as I know, it was never made readily available --

THE COURT: It bears only on one matter. The only purpose of your question is to show whether or not it was present at this meeting on February 28th, as the witness testified it was --

MR. GILLESPIE: I think the meeting, your Honor, was

April 4th.

THE COURT: April 4th, yes.

The stamp of the later date is the stamp of the attorneys.

Now, any other questions on this document?

MR. WECHSLER: No, your Honor, no further questions.

THE COURT: Do you want any more time to look at this, do you think?

MR. WECHSLER: No.

THE COURT: Then I infer that it contains the notation that the witness says it contained; so that I won't have to read this all over.

MR. WECHSLER: We do not concur in that inference, your Honor.

THE COURT: Well, the facts speak for themselves on that.

Any further question?

MR. WECHSLER: No further questions from this witness.

THE COURT: All right.

MR. Gillespie?

RECROSS-EXAMINATION

BY MR. GILLESPIE:

Q Mr. Haynes, I refer you to the handwritten notes that have been marked as Defendants' Trial Exhibit A for

identification, and ask you if you know whose handwriting this is?

A Mr. James Prince's, who was vice-president, administration and secretary of the Boeing Company.

BY THE COURT:

Q Is he with the company today?

A He is.

Q What is his position today?

A He is senior vice-president, administration, and secretary of the Boeing Company.

BY MR. GILLESPIE:

Q I have opened those handwritten notes to a page, and I ask you what the notation is which has refreshed your recollection that the Touche Ross opinion was present at that meeting on April 4, 1960?

A The notes read: "Have reviewed approach to this problem with local counsel, accountants (Touche Ross) and Harriman Ripley, and they all agree that the approach recommended, that is, $15,250,000 plus cash to be received on the exercise of options be accepted."

MR. GILLESPIE: I have nothing further, your Honor.

THE COURT: Any other questions of the witness?

(No response.)

THE COURT: All right, you are excused, --

MR. WECHSLER: We have one more question.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. WECHSLER:

Q I show you Exhibit No. 35 to the stipulation of what certain witnesses would testify to in this case, and call your attention to Page 3 of such exhibit, in particular to the information contained on the two lines reading "Stock option," and below that "(Section 4.05)(b)(v)." and ask whether the information recorded to the right of that in those three columns was recorded with your knowledge?

A Recorded with my knowledge?

May I see the memorandum?

Q Yes (handing).

A This is a memorandum dated March 10, 1961. It is addressed to myself and Mr. Nelson and Mr. Melby; it was prepared by L. E. Filion, and the section that is being referred to is entitled "Conversion rate calculation to date is as follows." Now what is your question?

MR. WECHSLER: Would you repeat the question for the witness, please?

(Question read.)

A I don't understand your question as to "recorded."

Q Was it set forth as it is set forth here with your knowledge?

A I didn't write the memorandum. It is set forth in the memorandum as you have read it. The Boeing position on the calculation of the conversion rate is expressly set forth in the statement of facts and in our brief.

Q I ask whether the information there was placed there with your knowledge?

A The memorandum was written and sent to me. I didn't have anything to do with the preparation of the memorandum, so it wasn't placed there with my knowledge.

I again reemphasize, the Boeing position relative to the calculation of the conversion rate is clearly set forth in the statement of facts and in our briefs.

Q Did you approve or disapprove the calculations and the explanations contained therein?

A There is no necessity for me to either approve or disapprove.

Q I didn't ask you regarding what necessity there was. I asked you whether you did approve or disapproved?

A I did not approve or disapprove. It was a memorandum that somebody put in the file.

b-2

Q As vice-president of finance, was it your function to approve or disapprove this type of material?

A There is no requirement to approve or disapprove a memorandum.

Q What was your responsibility with reference to the conversion rate, as vice-president of finance at Boeing?

A Well, my responsibility would have been to consult with both legal and accounting counsel as to the method of calculating the conversion rate and to consult with them to the effect of any required adjustments to that rate.

Q And after consultations with these people that you have just referred to, what was your responsibility?

A At what date and time, now, are you referring?

Q March 10, 1961.

A Well, at that point in time -- 1961?

Q Yes.

A -- I would have had the responsibility to advise whether or not, after consultation with appropriate counsel, advise whether or not an adjustment to the conversion rate was required.

MR. WECHSLER: We have no further questions.

THE COURT: Any further questions?

MR. GILLESPIE: No further questions.

THE COURT: All right, you are excused.

(Witness excused.)

THE COURT: Next witness.

MR. WINER: Your Honor, the same problem is going to arise in connection with Mr. Olsen.

THE COURT: Call the next witness. Put him on the stand.

MR. WINER: Well, I want to object to his being put on the stand.

THE COURT: Then don't call him. I don't care whether you call him or not. You are trying your case.

MR. WINER: Well, we will have to have a committee meeting to decide whether we will call him or not.

THE COURT: It is up to you.

MR. WINER: It will be up to the committee. We will have to decide.

THE COURT: You should have decided overnight. You should have decided before the trial.

MR. WINER: It happened Mr. Steinman had to see a very ill wife --

THE COURT: But it happened that you men have been working together on this case since 1966, and at the depositions you all were present and you all worked together; you all heard what went on, and you worked in harmony together, and one man examined the witness.

Now at the trial here you are making a big todo, and while you are making this big todo you are delaying the trial, you are imposing on the Court, and you are interfering with the orderly presentation of your own evidence.

MR. WINER: Your Honor, I would like to correct the statement you made. The witnesses were not examined by one plaintiff's counsel, but by two plaintiffs' counsel in each case, of Mr. Olsen and Mr. Haynes.

THE COURT: I say that while this witness was examined you all were present; you all sat throughout the entire deposition; you were not strangers to the case; you were not strangers to the testimony of the witness, and that is what I said, and nothing else.

Go in the back room there and hold your conference. I will wait here while you do it.

MR. WECHSLER: Your Honor, it is my position that as a member of the plaintiffs' committee I am entitled to call a witness on the plaintiffs' case, and I want --

THE COURT: You call anybody you want.

MR. WECHSLER: I call Harold Olsen to the stand.

THE COURT: All right, you may do so.

MR. WINER: Your Honor, I object to it. I believe there is a committee of three, and I believe the committee of three should decide whether the witness should be called or not. We have been confronted with circumstances we did not foresee --

THE COURT: I should think that you would have had plenty of time to prepare for this case for trial --

MR. WINER: -- and we have put in millions of hours, probably --

THE COURT: Well, I don't know what you have been doing.

The trouble, Mr. Winer, is you don't let me finish.

MR. WINER: I am sorry.

THE COURT: I don't like your attitude, and I don't like your position with your hands on your hips. That is not the right way for a lawyer to stand and address the Court. Now, I am not in a belligerent mood; you probably are.

MR. WINER: No, I think I have demonstrated the opposite, your Honor.

THE COURT: I think you have demonstrated positively just the opposite of what you say you did.

If you want to have a private conference, retire now for five minutes.

MR. WINER: That is what I want to do.

THE COURT: All right, go inside and talk it over amongst yourselves. Take my robing room, and I will reamin here.

(Recess.)

MR. STEINMAN: Your Honor, we have been trying to work out a solution, and there is one question which I would like to put to your Honor in order to be able to work out --

THE COURT: Even though this is most unusual, I have no objection to your doing it. I have tried to cooperate --

MR. STEINMAN: These are extenuating circumstances.

If your Honor would clarify one question in our minds: If Mr. Wechsler were to call Mr. Olsen on direct as his witness and the defendants call Mr. Olsen later on, would it be in violation of your Honor's ruling to permit Mr. Winer to cross-examine Mr. Olsen?

THE COURT: No, if they call him at a separate time I will let him do it.

MR. STEINMAN: Thank you.

THE COURT: But if they go in on the whole case while he is on the stand I want the one man to continue. I don't want two lawyers for one party examining the same witness during the same appearance on the stand.

MR. STEINMAN: I understand.

THE COURT: And there is no need for it in this case. You lawyers were all present when these witnesses were deposed.

MR. STEINMAN: I just have one further question --

THE COURT: This is most unusual that a Judge subjects himself to this interrogation. However, I am the most accommodating fellow in the world. I want to see this case fairly, fully and adequately presented, but I have to

protect the Court and the record, and I am not going to set a bad precedent of having a series of counsel representing the same plaintiffs one after another take over the same witness, particularly where everybody is familiar with the testimony of that witness.

MR. STEINMAN: Yes.

Well, your Honor has been supported in that view many times, and we just felt that in this case the circumstances are such that your Honor could give some leeway --

THE COURT: I am giving you as much leeway as I possibly can. I let two lawyers make an opening statement, and instead of making an opening statement I received two summations.

MR. STEINMAN: Well, to conclude this, your Honor, if the defendants did not call Mr. Olsen but proceeded to elicit whatever information they intend to elicit from him on cross-examination --

THE COURT: He will be examined by the lawyer who is examining for the plaintiffs. Everybody was present at this deposition. You were all there. You worked together on this case since 1966. You became familiar with every detail of it because of the division of the work, your interrogatories, your inspections, your motions, your amended pleadings and everything else.

All right, who is your next witness?

I should say now, gentlemen, we will sit until about five minutes to one, and if you want to take about an hour and a quarter for lunch --

MR. GILLESPIE: We can make it at two o'clock, your Honor.

b-3 THE COURT: We will make it 2:15. We will recess at five minutes to one, and we will come back at a quarter after two, and then this afternoon I will have to adjourn at half-past three.

Now, on Friday morning I have got a matter on at nine o'clock, and one at 9:15, and I've got a Chapter X matter on at 10:00 o'clock, which I think will take anywhere from half an hour to forty-five minutes.

I think it best, so that you men don't waste the time, that you come in tomorrow morning at 11:00 o'clock.

Is that favorable to everybody?

MR. WECHSLER: Yes, your Honor.

THE COURT: All right, your next witness, Counsellor.

MR. WECHSLER: I would like to call to the stand Harold F. Olsen.

MR. WINER: Your Honor, to protect the record -- I am going to object to calling Mr. Olsen -- and in the event he is called by the defendant and I am later able to cross

examine him, I will then withdraw my objection.

THE COURT: All right.

Come up and be sworn as a witness, Mr. Olsen.

H A R O L D F. O L S E N, called as a witness, being first duly sworn. testified as follows:

THE COURT: Your address?

THE WITNESS: 8875 Overlake Drive West, Bellview, Washington.

THE COURT: Now, was Mr. Olsen deposed? Was a deposition taken?

MR. WECHSLER: Yes, your Honor.

THE COURT: Has it been filed?

MR. WECHSLER: No, it has not been filed.

THE COURT: If it has not been filed I think we ought to mark it for identification, and I would like to have a copy, and I should get that now.

MR. WINER: I handed up a copy.

THE COURT: I have received one copy of the deposition of Harold W. Haynes. Is that the original?

MR. WINER: Here is an original copy.

THE COURT: Mark it Plaintiffs' Trial Exhibit No. 3 for identification.

(Marked Plaintiffs Trial Exhibit No. 3 for identification.)

xxxxxxx

THE COURT: All right, go ahead.

DIRECT EXAMINATION

BY MR. WECHSLER:

Q Mr. Olsen, are you an attorney?

A Yes, sir, I am.

Q When were you admitted to practice?

A In 1948.

Q Do you practice with a firm?

A I do.

Q What is the name of that firm?

A Perkins, Coie, Stone, Olsen & Williams.

Q How long have you been associated with that firm?

A Since December of 1948.

Q And are you a partner in that firm?

A I am.

Q How long have you been a partner in that firm?

A Since January 1st of 1954, I believe.

Q Does the firm perform legal services for Boeing Company?

A Yes, the firm is general counsel for the Boeing Company

Q And have you personally participated actively in the rendering of such legal services by your firm to Boeing?

A I have.

Q And how long have you participated in such legal work?

Take 4

A Since some time in, I think, 1950, perhaps -- yes, 1950 or 1951.

Q I show you Exhibit 43 to the stipulation of what certain witnesses would testify to, being a copy of Section A 10 of the New York Stock Exchange Manual, and ask you whether you are familiar with that section of the manual as of that date?

A Yes. I would have to add I have not looked at it in the last two or three months. It could have been amended since I last looked at it, but I am familiar with it.

Q were you familiar with the contents of Section A 10 on February 28, 1966?

A Yes.

Q And you had read it previously?

A Yes.

Q In connection with the call of the subject Boeing debentures did you discuss the contents of Section A 10 with any of the employees of The Boeing Company prior to February 28, 1966?

A Yes, I believe so.

Q When was your first sumh discussion?

A I believe it probably would have been at the meeting I had with Mr. Haynes and Mr. Thornton on February 24th.

Q Was anyone else present at that meeting?

A I believe there were just the three of us. Whether I discussed this in terms of seeing SEction A 10 or not I couldn't be certain, but the general contents of it we talked about.

Q What was the substance of your discussion at that meeting?

A I pointed out to them that if the Company were to call the debentures, that since they were listed on the New York Stock Exchange it would be necessary to give the Stock Exchange notice of the call.

Q Did yeu also discuss with them the press releases, news releases that were described in Section A 10?

A Yes. I pointed out that the Stock Exchange Manual suggests that such releases be issued when action is taken in connection with the call of the debentures on the Stock Exchange.

Q When was the next time you discussed the contents of Section A 10 of the Stock Exchange Manual with any employee or director of Boeing?

A Probably on February 27th, when Mr. Haynes and I met with Mr. Allen.

Q Can you give the substance of your discussion regarding Section A 10 at that meeting?

A Again, it was fairly general in nature. I pointed out

to Mr. Allen that if the Company were to call the debentures for redemption that notice should be given to the Stock Exchange and that the Manual suggested that a press release be issued.

Q Did you attend the meeting of Boeing held on February 28, 1966?

A I attended a portion of it.

Q Did you make a presentation to the board of directors regarding the call of the debentures?

A Yes.

Q What did you tell the board of directors regarding the call of debentures?

A I was actually asked to review a proposed series of resolutions relating to a proposal to amend the certificate of incorporation to increase the authorized capital stock, to adopt a proposal to split the stock if the stockholders approved the amendment to the certificate, to authorize the officers to take steps toward the issuance of additional capital stock or securities convertible into capital stock through a rights offering, to make certain other amendments to the certificate of incorporation relating to the authorized capital, to state a cash dividend policy, and to authorize the officers to call the debentures.

I had prepared in advance of the meeting a series of

proposed resolutions and a time schedule for consideration for the accomplishment of these steps, and in my presentation I reviewed the purport of these proposed resolutions, and the time schedule, the proposed time schedule for the call of the debentures was included, dated for this was included within the total time schedule, and the proposed resolution authorizing the officers to call the debentures for redemption was one of the resolutions I reviewed.

Q Did you discuss Section A 10 of the Manual or the substantive contents thereof at that meeting?

A I don't believe I did.

Q Did the board of directors pass a resolution at that meeting selecting the redemption date or the date upon which the conversion privilege for the debentures would expire?

A No.

Q Who was to select those dates?

A The resolution authorized certain officers to select the dates and to make the call.

Q Who were the officers who were selected?

A I think I would need the resolution to refresh my recollection.

MR. GILLESPIE: The exhibit is Exhibit 38.

A (Continuing) And the resolution provides the president, the vice-president of finance or treasurer of the

Company, or anyone of such officers is authorized to take the action.

Q Did you call the New York Stock Exchange on February 28th prior to the board meeting?

A I did.

Q Whom did you speak to there?

A I believe it was Mr. Shriver.

Q What was the substance of your conversation?

A I called him for the purpose of reviewing with him on a confidential basis our proposed schedule for accomplishing all of the corporate action that I have just described, calling the stockholders meeting, amending the certificate of incorporation, adopting a resolution with respect to future dividend policy, filing an S-1 registration statement to accomplish a rights offering by the capital stock or securities convertible into capital stock and the call of the debentures.

I had a tentative time schedule that I reviewed later in the day with the board, and I reviewed that time schedule with Mr. Shriver to see if it was consistent with procedures that would be suggested or approved by the Stock Exchange and to solicit whether he had any other suggestions or comments that would be of assistance to us in carrying out the programs that the Company had in mind.

Q Did you call the New York Stock Exchange after the

board meeting of February 28, 1966?

A Well, I had later conversations with representatives of the Stock Exchange, yes.

Q Did you telephone the New York Stock Exchange and speak to Mr. Raftery after the board meeting of February 28, 1966?

A On the 28th? No. The board meeting lasted all day, until about 8:00 or 8:30 in the evening, as I recall, and the matters in consideration, the resolutions that I had prepared, were taken up fairly late that evening, after 6:00 o'clock, as I recall.

Q Had the board meeting ended early you might have called Mr. Raftery then? Is that the import of your answer?

A I might have, yes.

Q When did you call Mr. Raftery, then?

A I talked to Mr. Raftery on the telephone on March 2nd.

MR. WECHSLER: I would like to read into the record interrogatory 13, and the answer thereto, 13 of the plaintiffs' interrogatories:

"State whether any person connected with defendant Boeing inquired of the New York Stock Exchange with respect to the publicity required by it in connection with the redemption or conversion of the debentures and if so, give the names, addresses and capacities of such inquirers and

state the dates and circumstances surrounding these inquiries and the nature of any discussion, correspondence or documents submitted to the New York Stock Exchange in connection with notice of the redemption of the debentures.

Answer: Prior to the Board Meeting on February 28, 1966, Harold F. Olsen, Boeing counsel, called R. N. Shriver of the New York Stock Exchange, and reviewed with him the tentative agenda of the proposed call of the debentures and other matters and solicited recommendations as to any of such matters. On March 1, 1966, H. V. Kohr of Boeing directed a teletype to the New York Stock Exchange (subsequently confirmed by letter) advising that at a meeting on February 28, 1966 the directors of Boeing had authorized its officers to call for redemption of the company's 4-1/2% convertible subordinated debentures and that the redemption date had not been established. On March 1 Mr. Joseph P. Raftery of the Exchange telephoned H. V. Kohr to inquire as to dates. Later that day Harold F. Olsen telephoned Mr. Raftery to advise that the specific date for the call had not yet been selected.

"On March 7, 1966, Mr. Olsen called the Exchange to advise of the dates selected for making the call, for expiration of the conversion privilege and for the redemption. A copy of the notice of redemption as published in accordance

with the terms of the indenture was mailed by Chase to the Exchange on March 8, 1966.

"A letter dated March 9, 1966 was received by Boeing from Arthur L. Rauch, Assistant Director of the Department of Stock List of the New York Stock Exchange in response to which (1) by letter dated March 16, 1966 H. V. Kohr, Assistant Secretary of Boeing, sent two certified copies of the resolution adopted by Boeing's Coard of Directors at the meeting held on February 28, 1966, which authorized the redemption of the debentures, and (2) by letter dated April 5, 1966, John L. Howard of the Corporate Trust Division of the Chase Manhattan Bank advised that funds had been deposited with the bank to effect payment of the debentures at the redemption price of 103.25%, together with accrued interest to April 8, 1966. These letters have previously been furnished the plaintiffs."

Does the material I just read to you, and, in particular, the sentence regarding a March 1st conversation between you and Mr. Raftery, refresh your recollection as to when after the February 28, 1966, board meeting you called the New York Stock Exchange?

A It is obvious I misspoke myself. I said March 2nd, and it was March 1st, and it was, in fact, March 1st that I talked to him.

Q Will you give me the substance of your conversation with Mr. Raftery on March 1, 1966?

A Yes. Apparently following receipt of the telegram from Mr. Kohr, he had called Mr. Kohr, and asked if the dates for the call of the debentures had been fixed. Mr. Kohr advised him that they had not.

The balance of the conversation that took place between them I guess I am not sure I know if I knew then. In any event, Mr. Kohr called me, told me he had had the call from Mr. Raftery and suggested that I call him, which I did.

I called and explained to Mr. Raftery that I had talked to Mr. Shriver on the 28th and that our resolution did not fix dates, that it authorized the officers to call the debentures and to fix the dates, and that we were having meetings scheduled to commence the next day with the Company's underwriters and their counsel to develop in more detail the Company's plans for the upcoming financing, and that the call of the debentures was one of the first steps of that financing, and the dates for the call of other debentures could not be fixed until we had had a chance to review these matters and arrive at a program with the underwriters and their counsel.

I think that generally was the substance of my call.

Q Did you tell him you would let him know as soon as

you fixed the redemption date and expiration of conversion privileges?

A Yes, I am reasonably sure I did.

Q Was a news release issued by Boeing on February 28, 1966?

A Yes.

Q Did it go to one or more newspapers of general circulation in New York City which generally publish financial news?

A I believe it did. I believe there was an exhibit in evidence that specified the distribution made of the press releases. Obviously it would be more accurate than my recollection.

MR. GILLESPIE: The detail of that is in 120 of the agreed stipulation of facts and Exhibit 40.

Q Did it go previously to Dow Jones & Company?

A I would not know that of my personal knowledge.

Q Did it go to one or more major national news wire services?

A I believe it did. I believe the exhibit so states.

Q Was it marked for immediate release?

A It was.

Q Did it contain any dates, tentative or otherwise, regarding the call of the debentures?

MR. GILLESPIE: Your Honor, I submit we are getting to a place where the contents of this press release is being inquired of. I think the press release speaks for itself.

THE COURT: Unless you want to test his recollection.

b-3 MR. WECHSLER: Yes.

THE COURT: You may test his recollection.

THE WITNESS: It did not.

Q Did you attend the meeting on March 2, 1966, regarding the call of the debentures?

A I would have to answer that in this way: I attended the meeting on March 2nd with respresentatives of the Company, its investment bankers and their counsel, to consider the upcoming financing program under consideration by the Company, and one of the matters that we discussed at that meeting, and in those meeting that ensued for several days, was the call of the debentures, yes.

Q Was Mr. Thornton present at that meeting on March 2nd?

A He was at least part of the time.

Q Didn't you set the date for the call of the debentures and for the expiration of the conversion privilege on March 2nd?

A I would have to answer the question this way: One of the first orders of business of the meeting was to consider a timetable for accomplishment of all of the corporate

action that was contemplated. We fairly early in the meeting did arrive at a revised timetable, changing some of the dates from those that I had reviewed with the board of directors, but no firm decision was made at these meetings on dates for the call of the debentures.

Q Are you saying that you did not select April 8th as the redemption date for the debentures on March 2, 1966?

A The time schedule that was made out on either March 2nd or March 3rd did identify March 8th -- I'm sorry - April 8th as the date then under consideration for redemption.

Q Didn't a letter sent out by Mr. Thornton on March 2nd state, "The redemption date we have selected is March 8, 1966?" Wasn't that letter sent on March 2nd, and wasn't that letter sent to the Chase Manhattan Bank?

A May I see the letter you are referring to?

Q You certainly may.

A Is it an exhibit?

Q Trial Exhibit 1.

A It recites, "The redemption date we have selected is April 8, 1966." Later it says, "I understand you will make arrangements to have the notice prepared and published and that we will have an opportunity to review the draft before publication." I would not regard that as a fixed authorization to prceed.

Q You don't regard, "The redemption date we have selected is April 8, 1966," as having been a selection of April 8, 1966 as the redemption date? Is that what you are suggesting?

A I can't change the letter that is written there. It is obviously what the letter says. My pretty clear-cut recollection of the meetings that took place between Boeing, representatives of Boeing and its underwriters and counsel, at which I was in attendance throughout, is that we did not make a firm decision during these meetings to proceed with the call.

Q Aren't you saying this letter is wrong, then?

A If the letter is to be read as stating that an irrevocable decision had been made, I will say it does not comport with my understanding of the result of those meetings.

Q I didn't use the word "irrevocable." Would you say that a tentative decision was made on March 2nd to call the debentures on April 8th?

A Yes.

Q Did you call the New York Stock Exchange on March 2, 1966?

A Did I?

Q Yes.

A I don't believe so.

Q Do you know whether anyone at Boeing called the Stock Exchange on March 2, 1966, to inform them that the redemption date had been selected by Boeing?

A Not to my knowledge.

Q Did anyone call the New York Stock Exchange on March 3rd to inform them that the redemption date had been selected by Boeing?

A Not to my knowledge.

Q Did anyone on behalf of Boeing call the New York Stock Exchange on March 4th to inform them that April 8th had been selected as the redemption date?

A Not to my knowledge.

Q Did you call the New York Stock Exchange on March 7, 1966, to inform them that the redemption date and expiration of conversion date had been selected by Boeing?

A Yes, I did.

Q Is that the first call, to your knowledge, by yourself or any other person acting on behalf of Boeing to the Stock Exchange informing them of the date of redemption and the date selected by Boeing for the expiration of the conversion privilege?

A Well, as I previously testified, on the 28th of February I discussed a tentative schedule with Mr. Shriver. I have reason to believe that in discussing this matter with

Mr. Raftery on March 1st I also discussed with him the tentative schedule. On March 7th I advised Mr. Raftery that a firm decision had been made to proceed, and gave him the date.

MR. WECHSLER: Could you read the question back to the witness, please?

(Question read by the reporter.)

A A firm decision, yes.

Q Did Boeing issue a general news release on March 2, 1966, regarding the selection of the redemption date and call of the debentures?

A Not to my knowledge.

MR. GILLESPIE: Your Honor, it's very difficult to hear the question or the answer in light of the competition.

THE COURT: I am everything but the engineer in this building; I can't stop it.

MR. GILLESPIE: Could we have the question and answer read back?

THE COURT: Yes. You can sit up here close.

MR. GILLESPIE: Thank you.

(Question and answer read.)

Q Did Boeing issue a general news release regarding the selection by Boeing of the redemption date between March 2nd and March 7, 1966?

A Not to my knowledge.

Q Now, when you called the Stock Exchange on March 7th and told them that Boeing had selected a redemption date and expiration of conversion privilege, would you agree with me by that time at the latest Boeing had selected a redemption date?

A Yes, sir.

Q What date do you think the date was that they did select the redemption date?

A To the best of my recollection and belief it was March 7th.

Q Who was present at the meeting on March 7th at which they selected the redemption date?

A I am not aware that there was a meeting.

Q Then who selected the redemption date on March 7th?

A I believe Mr. Haynes did.

Q He alone selected the redemption date on March 7th?

A I can't testify as to persons with whom he consulted or whether it was a joint decision. My best recollection, Mr. Wechsler, which is all I can tell you, is that he called me, I believe it was on the telephone -- I think not a meeting -- and advised me that the decision was firm to proceed, whereupon I telephoned the Stock Exchange to pass that information on.

MR. WECHSLER: Your Honor, it is 1:15 now. I have

a few more questions for this witness. I would like to take a break, if we can now, particularly in light of the last question.

THE COURT: You want an hour and a quarter for lunch? Half-past two. The reason I let you go ahead, I thought you might conclude with this witness.

MR. WECHSLER: I was hoping to. I am sure I won't be long.

MR. GILLESPIE: Before we adjourn, your Honor, for several weeks by phone and by letter I have been attempting to learn from Mr. Winer the name of the expert, an accountant, I believe, whom the plaintiffs intend to call here. I have not been given that name. It would expedite the proceeding if he would do us the courtesy of letting us know who it is and the general substance of the testimony.

THE COURT: I am sure it's just an oversight on his part. He will let you know now.

MR. WINER: I'm sorry to say it's not an oversight, your Honor, and the reason has been because of the reciprocal treatment, going back to the request for admissions.

THE COURT: All right, then, tell me. Let me in on the secret.

MR. WINER: I will let him know. The gentleman is sitting here. He is Samuel Pivar, of the firm of Seidman &

Seidman, and he is chairman of the Accounting Principles Committee of the New York State Society of Certified Public Accountants.

THE COURT: I recognize him as a very competent accountant.

MR. GILLESPIE: Thank you, Your Honor.

THE COURT: Now do you want some information?

MR. WINER: I would like very much to know --

THE COURT: Just tell us what you want.

MR. WINER: I would like to know in connection with the requests for admissions what efforts were made to find out the facts on the statement by defendants after reasonable inquiry they can't answer.

I would like to know what their efforts were.

MR. GILLESPIE: What facts?

MR. WINER: I think Mr. Levit is well aware of it.

THE COURT: We will come back here in an hour and a quarter from now; that will be twenty-five minutes to three.

- - -

(Luncheon recess taken to 2:35 p. m.)

- - -

Take 1

AFTERNOON SESSION

(2:35 p.m.)

H A R O L D F. O L S E N, Resumed:

DIRECT EXAMINATION CONTINUED

BY MR. WECHSLER:

Q Mr. Olsen, were you present at all of the substantive discussions regarding the call of debentures which took place between March 2nd and March 4, 1966?

A I believe I was.

Q Was the date selected by Boeing for the first publication of the notice required by the indenture determined at the same time as the redemption date was determined?

A Yes, I believe so.

I should perhaps explain: We had a tentative schedule. We made some changes to the schedule. I believe there were three key dates. One was the date of first publication; second is the date for expiration of the conversion privilege; third is date for redemption.

In our tentative time schedules we changed some of those dates but not others.

Q Well, let me ask the question in a slightly different way: Was the redemption date and the date of first publication firmed up at the same time?

A Yes, I believe so, because it was a single decision

to proceed, and that decision involved all of the dates.

Q I would like to read to you Paragraph 132 from the agreed stipulation and ask you whether this refreshes your recollection regarding the determination of the redemption date:

"After the Boeing Board Meeting of February 28th and after the decision to call the debentures and to make the first publication on March 8, 1966, attorneys for Boeing further revised the notice of meetings, the proxy and the proxy statement on March 4, 1966, and on March 5, 1966, sent the said revised items to the SEC and to the New York Stock Exchange under cover of letters and stated that 'it is planned that the proxy, notice and proxy statements will be released to stockholders on or about March 24, 1966'."

I have read that stipulation paragraph only in part, only in relevant part.

I ask you, does that not indicate to you that the decision to make the first publication on March 8, 1966, had already been made on March 4, 1966?

A You could perhaps draw that connotation from this precise statement. I agree, I think the important statement here has to do with the revision of the proxy materials. I wouldn't quarrel with your connotation of this statement.

MR. WECHSLER: Thank you.

Q Were the dates you say that were tentatively selected on March 2, 1966, the dates actually used for redemption and cutoff of the conversion period and publication date?

A Yes, I believe they were.

Q Do you remember discussing changing those dates at any time after March 2, 1966, and prior to the call of the debentures?

A Well, one of the first orders of business each day as we were meeting was, again, go over time schedules based on the discussions of the preceding day. Whether in any of those discussions we specifically discussed changing these dates, assuming a decision was made to proceed, I guess I wouldn't specifically recall.

I think it is fair to state that once we had revised these dates, or some of them, which I believe occurred on the first day of the meetings on March 2nd, I believe these dates remained fairly well fixed in our schedules, assuming we were going to proceed with the rest of the corporate program that was under discussion.

Q Well, is it fair to summarize your testimony in that regard by saying you have no specific recollection of a conversation in which the issue of changing these dates was brought up after March 2, 1966?

A The dates were not changed, and I cannot recall any discussions concerning possibilities of changes.

Q At any rate, you testified that the dates were firm on March 7, 1966, when you called the New York Stock Exchange, is that correct?

A Yes.

Q Was a news release issued on March 7th by Boeing?

A Not to my knowledge.

Q When was the first publication by advertisement as required by the indenture, made by Boeing?

A I believe it was March 8th.

Q And was a news release regarding the call of debentures issued by Boeing on March 8th?

A Not to my knowledge.

Q When was the first date that Boeing issued a general news release after March 2nd regarding the call of the debentures?

A The only one of which we have any knowledge was issued, I believe, on March 25th. It is in the record, and if my recollection of the date is not correct, I would correct it to what is in the record.

MR. WECHSLER: I have no further questions, your Honor.

THE COURT: We will take a few minutes recess.

(Recess.)

CROSS-EXAMINATION

BY MR. GILLESPIE:

Q Mr. Olsen, in the course of your examination this morning you were asked about a meeting between representatives of the Boeing Company and the underwriters and their counsel held between March 2nd and March 4, 1966.

Could you tell us in general who were present at those meetings and where they were held?

A The meetings were held in Seattle in one of the conference rooms in the Boeing plant, their headquarters offices. Mr. Maynes, Mr. Thornton and I were present at most of the meetings; Mr. Allen was present at some of them; a couple of meetings were held in Mr. Allen's office; Mr. Townsend of First Boston Corporation, Mr. Laeri, Mr. Campbell, all of the First Boston Corporation; perhaps others, I don't recall at the moment. Mr. Morehouse, Mr. Fitzgerald --

Q Mr. Morehouse of --

A Harriman & Riply. I believe there were a couple of other representatives from Harriman & Ripley, from Foshay, and Mr. Darrell of Sullivan & Cromwell, counsel for the underwriters, were there.

Q I think you testified this morning that at this

meeting, which ranged over this period of three days, there was only a tentative decision fixing the schedule for the call of the debentures and for the various steps related thereto. Could you tell us the reason or reasons why those decisions were only tentative during that period March 2nd to March 4th?

A Well, the purpose of the meetings really were to attempt to firm up basic decisions --

b-2

MR. WECHSLER: I object to this line of questioning on the same ground Mr. Gillespie objected previously. All of this is contained in the stipulations, and in particular I refer to page 38, stipulation 124 --

MR. GILESPIE: Well, there certainly are references to it, but Mr. Wechsler went into it this morning, and he challenged the tentative aspect of these decisions, and I am merely asking the witness what was the reason --

THE COURT: You see, the trouble, Mr. Wechsler, is that the stipulation simply provides that if the witnesses were called they would testify to this. It is not a stipulation as to facts as such.

Now, you have the right to examine him as to whether or not his testimony that is recorded here is true and correct; having had that right, Mr. Gillespie has the right then to show the details of it.

The objection is overruled. You don't really have a stipulation as to facts; what you have is a stipulation that if a witness were called he would testify thus and so. That is the distinction.

MR. GILLESPIE: Do you have the question, Mr. Olsen?

THE WITNESS: I think I would ask it to be reread.

(Question and answer thus far propounded read as previously recorded.)

MR. WECHSLER: Your Honor, I would raise a different objection. I object on the grounds of relevancy unless Mr. Gillespie can explain the relevance --

THE COURT: Frankly, I was going to ask that question myself so that I may get your point of view on this.

MR. WECHSLER: The relevancy --

THE COURT: The relevancy on the fact of this decision as to the effective date of the decision that was made to call these convertible bonds, what significance has it, particularly in the light of the statement that you don't contend that the provisons of the conversion debenture was not valid?

MR. WECHSLER: Your Honor, I am glad you asked that question --

THE COURT: What significance do you want me to attach to this? I don't understand what the purpose is?

MR. WECHSLER: Your Honor, I think you misunderstood my previous statement regarding that. I said on February 28th there was a press release which complied with Section A 10 of the Manual in every detail, and Section A 10 of the Manual in no uncertain terms requires that when any corporate action is taken looking toward the redemption of debentures, certain specific acts must be done.

Whether it was on March 2nd or March 3rd or March 4th or even March 7th, as Mr. Olsen testifies, Boeing was required by Section A 10, to which I direct your Honor's attention --

THE COURT: My attention has been directed to that, and I don't know that it requires it, but the provision is in A 10.

MR. WECHSLER: That is our contention, and that no matter which date, whether it was the 2nd, 3rd, the 4th, or even the 7th, as Mr. Olsen testifies, there was no press release then or up through March 25th; there was no notification to the Stock Exchange, if you look at Thornton's letter, which says that the date was selected on the 28th.

Section A 10 of the Manual not only defines the publicity but defines when it should be made and indicates that even a mailing would be insufficient notice, and that telephone, telegraph or hand-delivery would be required; and

it is our contention that there is no question but that there was no compliance with Section A 10, and that the only question involved here is one raised by the defendants, and that is regarding knowledge and whether such a violation is a per se violation of the Securities Act, or whether certain knowledge of the Section A 10 of the Manual is required, and I think we have elicited testimony that the defendants had knowledge, so that that is no longer an issue so far as we are concerned.

THE COURT: Indenture of the convertible debentures provides that the notice of redemption shall go out from the trustee - I think that is what he is called, indenture trustee - and that is the Chase Manhattan Bank; and A 10 says that care must be taken, in words or substance, that that notice go out as soon as the decision is made and that it not be delayed.

Now, the testimony here of this witness, and of the former witnesses we had here the other day, Haynes, and the first witness, the former president, was that before the final decision was made they consulted with their underwriting agents, Harriman Ripley - I think the name is; they consulted with an independent accountant on the evaluation, and they consulted with others, and that the final decision was not made until a subsequent date, and that as soon as it

was made and the notice was ready to go out, Chase Manhattan set the date, and they were told the time when they wanted to redeem it, and the timetable, and as soon as that notice was to be published a press release was given; Dow Jones was advised, and, in addition to that, there was a publication of the notice in the Wall Street Journal.

MR. WECHSLER: I think the testimony is exactly the opposite, your Honor. The testimony is that no press release was given when the date was selected, and when your Honor reviews --

THE COURT: The press release was not given by Boeing --

MR. WECHSLER: It was not given by anyone.

THE COURT: They notified the SEC, and they gave this to Dow Jones, and it went over the ticker --

MR. WECHSLER: That is not correct, your Honor.

MR. GILLESPIE: Excuse me, it is correct, your Honor.

THE COURT: It went over the Dow Jones ticket; and it was published at the same time that the notice went out to the Wall Street Journal and on all national releases; they had four national releases at that time, or there may have been three at that time.

MR. WECHSLER: Your Honor, I hope that in reviewing

the testimony I will be able to show that that is not the case --

THE COURT: All right, I will give you an opportunity to do that later.

MR. WECHSLER: And that Section A 10 requires the company to make these releases and specifically indicates that the listing agreement with the Stock Exchange, which is a contractual agreement, requires this, and there is nothing like a suggestion of a requirement of the company.

BY MR. GILLESPIE:

Q At any event, Mr. Olsen, you met with this group of underwriters for three days, and your testimony is that only a tentative decision was reached with regard to the schedule until the morning of March 7th, is that correct?

A Yes.

Q And thereafter on March 7th is it a fact that you telephoned the New York Stock Exchange?

A I did.

Q With whom did you talk?

b-3 A I believe it was Mr. Raftery

Q Would you give us in substance that conversation?

A I advised Mr. Raftery that a firm decision had now been made to proceed. I gave him the dates that had been selected.

He asked me if we would provide him with the notice. I told him we would; that the notice was being prepared and published by Chase, and that I would have a copy of the notice provided directly to him by Chase.

He also asked me some questions about the broad tape, and the ticker tape, how this information would be released to those tickers, because the publication of the first notice was to be made the very next day.

He said he would take care of it; and on the basis of that I felt that we had complied with the recommended procedures.

Q When you say "the recommended procedures," you mean of the Stock Exchange?

A Of the Stock Exchange Manual, yes, sir.

Q And have you since that time had opportunity to review the publicity that this call receiced as a result of your conversations or the other steps such as the advertising produced?

A Yes, I have.

Of course, the copies of the publication notice are in the exhibits, and a list of the other publications that carried the information, the dates on which it was carried, newspapers that carried notices of the call, are collected in defendants' requests for admissions, which is

a document on file with the Court, I believe.

Q And I believe you are referring to those exhibits which are attached to those requests for admissions?

A I am.

Q Now turning --

THE COURT: Now with reference to those requests for admissions, was there any response made by the plaintiffs to that?

MR. GILLESPIE: There were, your Honor, and I believe they are on file with the Court, and I think that I can report to your Honor that these requests for admissions, which are dated February 18, 1972, were responded to by the plaintiffs, and I can summarize for your Honor very quickly that the genuineness of the documents that are referred to in Paragraph 1, Paragraph 2, Paragraph 3, Paragraph 4, Paragraph 5, Paragraph 6 - the genuineness of the documents is admitted.

There are challenges to whether the conversion privilege had actually expired or not expired, but the genuineness of the documents and the circulation is admitted.

BY MR. GILLESPIE:

Q Now, Mr. Olsen, did there come a time in April 1966 when your opinion was sought as to whether the conversion date of the convertible debentures could be extended?

A Yes.

Q And did you give your opinion to the Boeing Company in connection with this?

A I did.

Q And is your opinion in writing?

MR. WECHSLER: I object to that, your Honor.

THE COURT: Overruled.

MR. GILLESPIE: Did you hear the question?

THE WITNESS: Yes, I did.

A It is in writing.

Q I show you a letter dated April 25, 1966, addressed to the Boeing Company, and ask you if that is your opinion?

A Yes, it is.

MR. GILLESPIE: I offer that in evidence.

A copy of this opinion was previously furnished to the plaintiffs in the request to admit, which I referred to just a moment ago, your Honor.

MR. WECHSLER: I object to this exhibit as being immaterial, self-serving and totally inadmissible --

THE COURT: What is the number of this exhibit?

MR. WECHSLER: -- and ex post facto, your Honor, and subsequent to the event.

MR. GILLESPIE: Your Honor, this is not included in the agreed statement or stipulation, but it is included in

the defendants' requests for admissions.

THE COURT: We have had a number of exhibits annexed to this. What exhibit number is this?

MR. GILLESPIE: It is 6.1, your Honor.

THE COURT: Okay, I have it.

The only thing is, it has no date on it.

MR. GILLESPIE: It may be up in the center of the page.

THE COURT: I have it, April 25, 1966.

MR. GILLESPIE: April 25, 1966, your Honor.

THE COURT: The objection is overruled. I am going to admit it.

xxxxxx (Marked Defendants' Trial Exhibit B in evidence.)

THE COURT: Defendants' Trial Exhibit B is also annexed to defendants' requests to admit as Exhibit 6.1.

BY MR. GILLESPIE:

Q Mr. Olsen, in connection with this request from the Boeing Company, did you, on behalf of the Boeing Company, seek the opinion of any other counsel?

A Yes, I did.

Q And who are they?

A Your firm, Davis, Polk, Wardwell, Sunderland and Kiendl at that time.

Q I show you a copy of a letter dated April 27, 1966,

addressed to the Boeing Company be Davis, Polk, Wardwell, Sunderland & Kiendl, and ask you if that is a copy of the letter which was delivered to the Boeing Company by Davis, Polk?

A Yes, I believe it is.

MR. GILLESPIE: I offer this in evidence.

MR. WECHSLER: Your Honor, I object on the grounds that this is ex post facto, after the call of the debentures, a self-serving document being produced by the very counsel who are attempting to try this case.

THE COURT: I am going to take it so that we will have a complete record.

MR. WECHSLER: I can't hear you.

THE COURT: I am taking it. It is annexed to the requests to admit.

xxxxxx (Marked Defendants' Trial Exhibit C in evidence.)

THE COURT: Of course, I am not bound to accept your opinion.

MR. GILLESPIE: Of course not.

THE COURT: Well, in order that we have the whole picture, I am taking it.

MR. WECHSLER: Mr. Olsen's firm withdrew as counsel as a result of Mr. Olsen serving as a witness, but now Davis Polk seeks to serve as a witness, and apparently they don't

think they ought to withdraw as counsel.

THE COURT: They withdrew as trial counsel, but I told the attorney who was from the company, from the firm, that I didn't see the reason for it, and if he wanted to withdraw, that was his privilege.

I think he wanted to withdraw because he felt there should be only one man who should bear the responsibility of the trial, and that was Mr. Gillespie, and, very frankly, were I in his position I would not undertake the trial unless I had full responsibility for it. I don't think you would have either.

BY MR. GILLESPIE:

Q Mr. Olsen, turning your attention to the meeting of the board of directors on February 28, 1966, you have told us that you attended part of that meeting.

Did you at that meeting render an opinion to the board of directors of the Boeing Company in connection with the call of the convertible debentures and the possible conversion of those convertible debentures in connection with that call?

A At the time of the meeting, during the meeting on February 28th, I had not prepared and delivered a written opinion. I think it was inherent in the presentation I was making which resolutions that I had prepared, that it was the

opinion of my firm, as general counsel for Boeing, that the b-4 action that I was proposing that they take was legal and valid.

Q At that time or at any time prior to that meeting had your opinion been sought with respect to the method of computing the conversion rate of the convertible debentures?

A Yes.

Q When was that?

MR. WINER: Your Honor,may we have the previous question reread, the one which he answered yes?

THE COURT: You are speaking through the voice of Mr. Wechsler?

MR. WINER: Well --

THE COURT: Well, we will deem the request as having been made by him.

(Question and answer referred to read as previously recorded.)

Q When was your opinion sought with respect to the method of computing the conversion rate of the convertible debentures, Mr. Olsen?

A Prior to February 28, 1966. I recall two separate occasions. The next one prior to February 28th was at the time in April of 1960, when the board was considering the valuation of the assets of Vertol, which had been acquired,

and a determination being made of that value; and I gave a written opinion on that subject; and prior to that time, some time in 1959, my opinion had been sought as to the proper interpretation to be placed on the sections of the indenture relating to the declaration and payment of stock dividends.

MR. GILLESPIE: Have you finished?

THE WITNESS: Yes.

Q Do you recall who it was who sought your opinion in 1959?

MR. WECHSLER: I object, your Honor.

THE COURT: Overruled.

MR. WECHSLER: On the same grounds as previously made. If Mr. Winer is not permitted cross-examination at this point the witness should not be permitted to answer that question.

THE COURT: Overruled. You are permitted to cross-examine. He is seated alongside of you.

MR. WINER: I'm sorry, may I hear your Honor's comment?

THE COURT: I have just repeated what I said twenty times before.

A I believe it was Mr. Melby, assistant treasurer of the Company, or one of his associates. My recollection is

not clear on that, whether it was Mr. Melby or one of his assistants.

Q Did you give that opinion in writing?

A I did not. It was an oral opinion.

Q What was the substance of your oral opinion?

A The question asked --

MR. WECHSLER: Same objection, your Honor.

THE COURT: Overruled.

A -- the question asked has to do with the method of calculating the consideration to be taken into account upon the issuance of a limited stock dividend, which is a term defined in the indenture. For corporate accounting purposes the resolutions of the Board of Directors had provided for a transfer from earnings to capital of the amount determined in accordance with the formulas specified, and the question was asked whether the consideration to be taken into account for purposes of determining under the indenture whether there should be an adjustment in the conversion rate, whether the formula specified in the indenture was the same as that specified in the resolutions of the Board of Directors declaring the stock dividend and which was, in fact, accomplished for corporate accounting purposes. I reviewed the indenture. My conclusion was that the indenture was fairly clear, that it specified a different method.

Q Did you refer to any specific provisions of the

indenture?

A I did.

Q I show you what has been marked Exhibit 4, a copy of the indenture, and ask you to refer to the provisions of the indenture which you were relying upon.

A It is Section 405, which is entitled Adjustment of conversion rate --

THE COURT: Section 405?

THE WITNESS: Which starts on page 34.

THE COURT: Yes.

THE WITNESS: It carries over to page 35, the subsection is 405(b)(IV).

Q Will you read it, please?

A It says in the case of shares issued as a limited stock dividend the consideration shall be deemed to be the number of shares so issued multiplied by the market value thereof (determined as provided in the definition of "Limited Stock Dividend" in Section 1.01) on the date of the declaration thereof.

Of course, to get the full formula of the definition, or definition, you have to go to an earlier section in the indenture which defines the term Limited Stock Dividend.

THE COURT: Where is that found?

Q Is that 101, Mr. Olsen?

A I am looking for it. Yes, Section 101 is entitled "Certain Terms Defined".

Q Page 17, perhaps?

A Yes, that is correct.

Q Now, reading that without reading it aloud, I will direct your attention to the sentence that begins "For the purposes of", which is about two-thirds of the way down in the paragraph. Will you read that, please?

A Yes.

"For the purposes of this definition 'market value' shall mean the last reported sale price of the capital stock on the New York Stock Exchange (or if not listed on the New York Stock Exchange, then on any national securities exchange where listed) on the date of the declaration of each stock dividend involved, or if there shall not have been a sale on such date, on the basis of the average of the bid and asked quotations thereof on said exchange on such date; or if the capital stock shall not then be listed on any national security exchange, on the basis of the average of the bid and asked quotations in the over-the-counter market

on such date."

Q And when you talked with Mr. Melby, or someone in his office, as you have testified, did you refer him to that portion of Section 101 of the indenture?

A Yes, I referred him to both Section 101 and Section 405.

MR. GILLESPIE: I have no further questions.

MR. WECHSLER: Mr. Gillespie, may I ask you whether you intend to call this witness on the defendants' case?

MR. GILLESPIE: I have completed my examination of Mr. Olsen.

THE COURT: The witness is on the stand to be examined both as to the plaintiffs' case and the defendants' case. I don't want to have a witness repeatedly called back to take his testimony piecemeal. This is an unduly protracted trial, and unnecessarily so. We have not any jury.

REDIRECT EXAMINATION

XX BY MR. WECHSLER:

Q You refer to a conversation you had with Mr. Raftery on March 7, 1966?

A Yes.

Q Have you remembered that from 1966 through to

today?

A Yes.

Q You didn't have a lapse of memory in between?

A My memory isn't very good, Mr. Wechsler, but I think I am accurately recalling.

THE COURT: What he has in mind, have y ou attempted to refresh your recollection?

MR. WECHSLER: No, your Honor, it is something a little bit different. I have something a little bit different in mind.

THE COURT: I am going to ask him the question, then.

To prepare yourself for trial have you gone and reviewed documents and did you find that your recollection was refreshed by the reference to documents as to the facts which you did not remember prior to your consultation of those documents?

THE WITNESS: Yes, sir. I have done quite a bit of reading in preparation for this appearance in court.

THE COURT: Has that refreshed your recollection as to the facts that you are testifying to here or are you testifying without your recollection being refreshed?

THE WITNESS: I think at this point I would have difficulty separating original memory from refreshed

recollection.

Q Do you remember looking at any document that refreshed your recollection as to a conversation with Mr. Raftery?

A I have reread the deposition that was taken earlier. I reread the statement of facts. I have read the request for admissions and the attachments to that, the exhibit, particularly the memorandum published by the New York Stock Exchange. I have found no specific notes of that conversation, other than the timetables and documents that are otherwise and exhibits here which I think identify the fact that I was to call him on that date.

Q Do you remember testifying on deposition then on April 10, 1969?

A Yes, sir.

Q I would like to read to you some questions from that deposition and your answers and ask you whether that correctly reflects your testimony on that date?

THE COURT: What page?

MR. WECHSLER: Page 12. I am going to start on line 2.

THE WITNESS: May I have a copy of it?

THE COURT: Why don't you go down to 14 or 15. You asked him that.

MR. WECHSLER: I am sorry, your Honor, I want to start reading from line 21 on page 12.

"Q It is indicated in interrogatory 13 that on March 7, 1966, you called the exchange.

"Would you tell us who you spoke to at the exchange on March 7?

"A Yes, I believe it was again Mr. Raftery, but I could not be certain."

THE COURT: Were you asked that question and did you make that answer?

THE WITNESS: Yes, sir, I believe I did.

THE COURT: Don't you know that you did?

THE WITNESS: Yes, I did.

Q "Q Do you remember the time of the day that it was?

"A I would be relatively sure it was in the morning."

Were you asked that question and did you give that answer?

"A Yes, sir.

"Q What was the substance of your discussion with Mr. Raftery?

"A I advised him that Boeing was proceeding to call the debentures and I gave him the specific

dates of the call."

Do you recall that question and that answer?

A Yes, sir.

Q "Q Is that the entire substance of your discussion?

"A Not quite. I believe he asked that we send him a copy of the call, which I told him we would do, and as the answer to interrogatory 13 indicates, the Chase Bank was asked to send a copy over to the Stock Exchange, which the bank did."

Do you recall that question and answer?

A Yes.

Q Haven't you testified to a lot of other things that you said to Mr. Raftery and he said to you?

A Yes.

Q How did you refresh your recollection from that date to today?

A As I indicated, by going over the other documents that are here, and, particularly, the request for admissions and the New York Stock Exchange documents that are included in that.

Q What was contained in those documents that refresh your recollection regarding what Mr. Raftery told you?

A One of the items was a memorandum to it providing for the information to be put on the stock ticker, Exhibit 1.1.

Q May I see that?

THE COURT: That is Exhibit 1.1 annexed to the defendants' requests.

Q Is it your understanding that the suggestion of Section A-10 of the Stock Exchange manual suggestestions or requirements, whichever they be, are the responsibility of the Stock Exchange as compared to that of Boeing?

A Well, they are procedures recommended. When you say the responsibility of the New York Stock Exchange or Boeing, I'm not sure I quite follow.

Q Let me make you very clear.

Section A-10 of the manual says the Exchange does not as a matter of practice release news of redemption of a listed security. Full responsibility for the release of such news is placed upon the company.

Didn't you say you read and are familiar with Section A-10 of the manual?

A Yes.

Q Did you read the brief submitted by defendants entitled Defendants' Memorandum prior to trial on which the name of your firm is placed?

A Yes.

Q Do you recall on page 52 a paragraph reading as follows:

"The March 2 decision tentatively establishing the call date (which became "Final" when the notice of redemption was released to the Wall Street Journal on March 7) was not itself similarly "publicized" in the sense of the manual definition of publicity, which calls for distribution of a press release to the wire services."

I will show it to you.

A Well, that is correct, as I have testified. Boeing did not issue a press release, as far as I know.

Q Boeing did not issue a press release as what?

A I say to my knowledge Boeing did not issue a press release. That was my testimony.

Q Do you know of a press release which complied with Section A-10 of the manual which was released by someone on March 2nd?

A As I previously said, I have no knowledge of any such press release.

Q Do you know whether anyone took care of complying with Section A-10 of the manual between March 2 and March 7?

A Well, as I have testified, Mr. Wechesler, I was in communication with the Stock Exchange on three separate occasions during this time period, on February 28 --

MR. WECHSLER: Your Honor, I don't think the witness is replying to my question.

THE COURT: Let him complete his answer, please. Go ahead.

A (Continuing) I was in communication with the Stock Exchange on three occasions, on February 28, again on March 1, and again on March 7.

On March 7 I gave the Stock Exchange the final dates which I had discussed with them previously as being tentative dates. As near as I can tell from my conversations with Mr. Raftery, he as the representative of the Stock Exchange was satisfied with the procedures that Boeing was undertaking. He didn't raise the question whether Boing was gong to issue a separate press release or not. We discussed how the information was going to get on the tickers, and it was my understanding that he was going to take care of that. I believe the record shows that the information was, in fact, fairly well disseminated. Certainly, the document attached to the request for admission shows the Dow Jones had the information, that the AP had the information from the AP bond

tables. So I don't think it is completely unreasonable that I should conclude that the basic intent and purpose of the Stock Exchange's suggested procedures had, in fact, been met.

Q Well, Boeing didn't meet them, I take it, from this discussion. Do you know whether the Stock Exchange took over Boeing's function in complying with this suggestion? Are you aware of exactly what they did on March 7 or 8?

A I am not aware in specific detail what the Stock Exchange did. My conclusions are based solely on the results of what, in fact, was done.

Q Well, you have already testified that Boeing didn't issue any press release between the end of February 28 and March 25? Isn't that correct?

A Yes, sir.

Q And I think you're testifying now that you don't know whether anyone else issued a press release -- please don't look away from me and at Mr. Gillespie --

THE COURT: Please don't give instructions to the witness that way. Ask your questions, please.

Q As I understand your testimony, you don't know whether somebody else might have made certain publicity which might be made to comply with Section A-10?

A I have no knowledge of any press releases, other than the information that has been collected and referred to in the request for admissions.

Q Now, on February 28 who issued the press release?

A It was issued by the Boeing public relations department.

Q Does something make you think on March 7, 1966, that that was no longer necessary, that Boeing issue a press release?

A As I said I was in communication with the New York Stock Exchange representative. I felt Boeing was doing what basically complied with the intent and purpose of the suggestion procedures.

Q Did Mr. Raftery tell you that the New York Stock Exchange would issue a press release?

A No, sir.

Q Did Mr. Raftery tell you that you were in compliance with Section A-10 of the manual?

A I don't know that we specifically discussed A-10 of the manual. We discussed the question of how the publicity was going to get out.

THE COURT: Are you going to be long with this witness? Much longer? It is a quarter to four now. I don't want to hurry you. If not, you will finish

tomorrow.

MR. WECHSLER: I think I would rather look over the testimony, since there has been some new material that this witness has brought up, and perhaps subpoena Mr. Raftery.

THE COURT: Who else are you going to call tomorrow? We will start tomorrow morning at 11 o'clock with this case. I am wondering whether we are going to finish, because I was told we would finish this case in three days. Otherwise, it will have to go over. I have a criminal case that is scheduled.

How long are you going to be with this witness, do you anticipate?

MR. WECHSLER: I think very little longer, no more than ten minutes, if at all.

THE COURT: Then are you going to call an accountant? Are you going to call a man from Touche, Niven?

MR. GILLESPIE: That is a different firm; it is Touche, Ross. He will be my only witness, your Honor, in view of the fact that we have taken care of all the other matters in the course of the plaintiffs' case. It will take about ten minutes.

THE COURT: You are going to call him as a

witness?

MR. GILLESPIE: Yes.

THE COURT: Who is your next witness? Do you know?

MR. WECHSLER: I have no witness, except perhaps Mr. Raftery and/or representatives of the Stock Exchange.

THE COURT: You are not going to call your accounting expert until after the plaintiffs do?

MR. GILLESPIE: I would submit I am not going to call my accountant until after we have heard the plaintiffs' accountant with regard to this in the plaintiffs' case.

THE COURT: I might suggest it would be better if you called your man first, because what really concerns me here is was the conversion rate fixed at the proper rate according to accounting methods, particularly with reference to the two dividends which had been declared, or should there have been a bigger allowance, a bigger amount.

MR. GILLESPIE: The plaintiffs' contention is it should be a bigger amount, but since we haven't been told what the substance of their expert's testimony is going to be --

THE COURT: You got an intimation of it from

the testimony, that they took a certain figure based upon a method of computing depreciation, as I remember. That is one ofthe things that is bothering me in this case.

MR. GILLESPIE: We are prepared to demonstrate what it is, but we believe we should have the plaintiffs' theory first.

THE COURT: I am not trying the case for either one of you.

MR. WINER: Might I address the Court at this moment?

THE COURT: Not at this time.

MR. WINER: You want to know how long we're going to go on tomorrow, so I thought I would volunteer. I am going to give Mr. Wechsler a lot of questions for this witness tomorrow.

THE COURT: Give them to him tonight.

MR. WINER: If your Honor is anxious to complete the trial, it will surely be hurried if I ask the questions.

THE COURT: I have a distinct view to the contrary. We won't go into that any more. I am not going to rehash testimony.

Tomorrow, gentlemen, at 11 o'clock.

(Whereupon, an adjournment was taken to November 17, 1972, at 11.00 o'clock a.m.)

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WILLIAM R. VAN GEMERT, et al.,

Plaintiffs

-vs- 66 Civ. 1820

THE BOEING COMPANY (Formerly Boeing Airplane Company) et al.,

Defendants.

NEW YORK, N. Y.
November 17, 1972,
11:00 a.m.

THE COURT: All right, now, we have a witness on the stand.

H A R O L D F. O L S E N, Resumed:

MR. WECHSLER: Your Honor, I would like to read a short stipulation into the record.

THE COURT: What kind of a stipulation is it?

MR. WECHSLER: This is a stipulation to clarify and add to certain facts in the agreed statement, and I could submit this letter, or read it into the record. It is a very short stipulation.

THE COURT: I don't like letters.

MR. WECHSLER: That is why I am suggesting to read it.

THE COURT: Why don't you put it in a stipulation and sign it?

In the meantime, let me look at the letter. I

don't like to have any legal proceedings conducted by letters.

All right, we will have it put in the form of a stipulation, and it will be copied into the record as well.

It is hereby stipulated that the agreed statement as to certain facts and as to what certain witnesses would testify to if called on trial, which was entered into by the parties to this action under date of July 14, 1971, be, and the same is hereby amended to include the following and additional stipulation, to wit:

It is stipulated that the Listing Agreement referred to in paragraph 18 of the Agreed Statement as to Certain Facts and What Certain Witnesses Would Testify to if Called at Trial (the "Agreed Statement") was in effect through April 1966. It is further stipulated that Section A 10 of the New York Stock Exchange manual, referred to in paragraph 130 of the Agreed Statement was in effect through April 1966.

(Signed) _____
Attorneys for Plaintiffs.

_____
Attorneys for Defendants.

_____
Approved by the Court.

Dated: November 15, 1972.

All right.

MR. WECHSLER: Mr. Winer has requested that I state for the record that I am reading to the witness questions submitted to me in writing by my co-counsel, Mr. Winer.

THE COURT: I wish you wouldn't make that matter a constant source of irritation to me. I made my rulings on that. Mr. Winer and everybody else have an exception. But it appears that Mr. Winer consistently refuses to take my rulings.

This letter stipulation is just another instance of that.

All right.

MR. WINER: Your Honor, may I make a statement?

THE COURT: No, I will strike the statement of counsel in his preamble and direct him to ask the questions.

MR. WINER: I respectfully request the right to make a statement in the light of the fact --

THE COURT: You can make the statement after this witness is through testifying. I thought we had given you plenty of time to make statements. Let us get on with this testimony.

REDIRECT EXAMINATION CONTINUED

BY MR. WECHSLER:

Q Mr. Olsen, in your opinion letter dated April 4, 1960, Exhibit 31, Page 2, you say: "But you will observe that under the terms of Section 405 of the indenture it is to the benefit of the owners of the convertible debentures to have the assets received from Vertol valued as low as possible while a higher valuation would be to the present stockholders' advantage. This conflict of interests dictates that care be taken, et cetera."

Did you know at the time to what extent that conflict of interest applied to the board of directors of Boeing?

A I guess I don't know how to answer the question.

THE COURT: By that you mean you don't understand the question?

THE WITNESS: Yes, sir.

Q Did you know that apart from 10,500 of stock option shares Mr. Allen owned 12,561 shares and no debentures?

A I think I now understand what you are trying to get at by the first question.

I knew the share ownership in the Boeing Company of the directors as of the date of the last prior proxy statement.

Q Did you know that Mr. Egveldt --

THE COURT: Wait a minute. Are you finished with

your answer?

THE WITNESS: Yes.

Q Did you know that Mr. Egveldt owned 18,898 shares and no debentures?

A If those are the figures quoted from the proxy statement, yes.

Q Did you know that all thirteen directors owned stock, nine of them in thousands of shares, and only three owned any of the debentures, and only one of those in any significant amount, and that he was an employee?

A Again I have to say that I was fimilar with the stockholders and the debenture holdings of the directors as reported in the proxy statement. I have no other information.

THE COURT: Is it contended that the proxy statement that was issued was incorrect or inaccurate with reference to stock ownership and debenture ownership of any of the directors or officers?

MR. GILLESPIE: Not that I know of.

MR. WECHSLER: No, it is not claimed, your Honor.

THE COURT: These figures that you are reading are all in the record as stipulated facts, aren't they?

MR. GILLESPIE: I think that is true, your Honor.

MR. WECHSLER: I was asking if the witness was aware of these when he rendered certain opinions.

THE COURT: I said they are all in the facts.

MR. WINER: They are not in the stipulation of facts.

MR. WECHSLER: They are not in the stipulation of facts, I am told, your Honor.

THE COURT: Well, wasn't the prospectus in the agreed statement of facts? Wasn't the proxy solicitation material in the agreed statement of facts?

MR. LEVIT: Your Honor, the 1966 proxy material is in the record, but they are referring to an earlier proxy which is not in the record.

MR. WECHSLER: Your Honor, I offer in evidence proxy statement of Boeing Airplane Company for the annual meeting of stockholders scheduled for May 3, 1960.

MR. GILLESPIE: No objection.

THE COURT: That will be received in evidence as Plaintiffs' Trial Exhibit 4.

(Marked Plaintiffs' Trial Exhibit 4 in evidence.)

THE COURT: Do you have an extra copy of this, Mr. Gillespie?

MR. GILLESPIE: It is the first time it has been called for. We don't have an extra copy. We have no copies.

THE COURT: Do you have an extra copy? I will

look at it.

BY MR. WECHSLER:

Q Did you suggest that the conflict of interests of directors with large stock holdings and no debentures should disqualify them from voting on the subject matter of the conflict of interests?

A No, sir.

Q Did you think that you had a conflict of interest in representing management?

A Did I?

Q Yes. Did you think that you had a conflict of interest in representing management and advising on the conversion rates?

MR. GILLESPIE: Your Honor, I object to that question because it assumes that Mr. Olsen's firm is representing management. My understanding is that they were representing the Boeing Company.

THE COURT: Well, that is what the question implies and that was what the witness testified to. His firm had represented the Boeing Company for many years, and I think he said he had been active in that work for - thirty-five years, was it?

THE WITNESS: No, sir, not thirty-five.

THE COURT: How many years?

Take 2

THE WITNESS: As of today it would be about twenty-two.

Q Did you advise Boeing to get advice from disinterested attorneys, accountants or bankers regarding the computation of the conversion rate.

A I advised them to get advice of their independent auditors and their investment bankers, yes. I did not suggest they get advice from any additional counsel.

Q Does Boeing still retain the same lawyers and accountants?

A Yes.

Q Are Drexel, Harriman & Ripley still financial advisers to Boeing?

A I don't know.

Q Which investment bankers show Boeing's latest public issue?

A The underwriting was managed jointly by First Boston Corporation and Drexel, Harriman & Ripley.

Q When did that take place?

A In 1966.

Q Was that 1966 offering after the call of the debentures?

A Yes.

Q According to Exhibit 25, Page 8, Mr. Haynes told

the board on April 4, 1960, that the counsel for the company advised that if the directors were fully informed of the facts a determination of "fair value" made by the directors in good faith, based on the market value of the company's stock on November 13, 1959 "probably it could not be challenged successfully."

Is that the opinion which you gave?

A I believe that is the general purport of my opinion, yes, a portion of my opinion.

Q Do you ordinarily express your opinion on whether something is right or wrong by saying that it probably could not be challenged successfully?

A Sometimes, not always.

Q Did that mean that you expected a challenge?

A No, sir.

Q And in your opinion letter of April 4, 1960, you wrote, at Page 2 "From our examination of the authorities it is our opinion that directors have broad power in the determination of the 'fair value' to be assigned property received in exchange for convertible stock and any Court would be extremely reluctant to override such determination when made in good faith and after a thorough consideration of all relevant facts."

Do you ordinarily frame your opinions based on the

reluctance of a Court to override?

A Was the question do I ordinarily do that?

Q Yes.

A Not always, sometimes.

Q You testified yesterday that you advised Boeing as to an adjustment to be made to the conversion rate in connection with the stock dividend of November, 1959. Did you also draw the resolution adopted on November 2, 1959, declaring the stock dividend?

A I either prepared it or reviewed it and approved it.

Q I show you a document headed "Minutes of Stated Meeting Board of Directors Boeing Airplane Company, November 2, 1959," and direct your attention to the fifth page of such document, commencing with the word "Resolved" at the top of the page, and ask you whether you drafted that resolution?

A I either drafted it or approved it. I would believe I probably drafted it.

MR. WECHSLER: I offer the document in evidence.

THE COURT: Where was this resolution passed?

MR. WECHSLER: November 2, 1959.

THE COURT: Where? The board of directors minutes?

MR. WECHSLER: Yes, your Honor.

THE COURT: Have we the minutes in evidence at all?

MR. GILLESPIE: No, your Honor, they have never been presented to us before.

No objection.

THE COURT: Received in evidence by consent.

Have you got a copy of these minutes?

MR. GILLESPIE: I do not have a copy. These were furnished some period of time ago to the plaintiffs in response to a notice to produce. We didn't know they were going to use them.

xxxxx (Plaintiffs' Trial Exhibit 5 received in evidence.)

THE COURT: If you are not going to use those minutes I would like to see them. I am referring to that last exhibit. Do you have another copy for the Court?

MR. WINER: I have a copy.

THE COURT: This is Trial Exhibit 5.

(Pause)

MR. WECHSLER: If I might, your Honor, the questions will deal with the material contained on Page 5 of the exhibit.

Let me correct that, your Honor, it is Page 6 of the exhibit, commencing on the top line, "It is resolved further that upon the payment of the stock dividend."

Q Did you advise Boeing that the computation for the conversion rate should be different than the computation

of the amount to be transferred from surplus to capital?

A I assume you are referring to computations to be made as a result of the declaration of this stock dividend.

Q Yes.

A And I did, yes.

Q Yesterday, at Mr. Gillespie's request, you read aloud from the indenture the following clause, Exhibit 4, Page 35 little four:

"In the case of shares issued as a limited stock dividend consideration shall be deemed to be the number of shares so issued multiplied by the market value thereof (determined as provided in the definition of 'limited stock dividend' in Section 1.01) on the date of the declaration thereof; and" -- then you went to Section 1.01 on Page 17, and read:

"For the purposes of this definition market value shall mean the last reported sales price of the capital stock on the New York Stock Exchange" --

THE COURT: Didn't we have this yesterday? It just refers to definitions, doesn't it?

Q -- "or if not listed on the New York Stock Exchange, then on any national securities exchange where listed (on the date of declaration of each stock dividend involved or, if there shall not have been a sale on such date, on the basis

of the average of the bid and asked quotations thereof on said exchange on such date, or if the capital stock shall not be then listed on any national securities exchange, on the basis of the avarage of the bid and asked for quotations in the over-the-counter market on such date."

Now, the resolution of November 2, 1959, reads:

"Resolved further, that when the payment of the stock dividend as herinabove directed, the officers of the company be and hereby are authorized and directed to transfer from the retained earnings account to the capital stock account the sum of $29.87.5 per share for each of the shares of stock required to be issued and distributed pursuant to the foregoing resolutions, which sum is an amount approximately equal to the fair value of such shares determined by reference to the approximate market price of such shares on the New York Stock Exchange at the close of business on such exchange on November 2, 1959, adjusted to give effect to the additional shares of capital stock to be outstanding upon the payment of said dividend."

Now, in each case the starting point is "the market price" at the close on the New York Stock Exchange, is it not?

A Yes.

Q In one case your next step was "the fair value of

such shares," was it not?

A It was the market price of the shares, yes.

Q In the case of a listed stock, isn't the fair value the same as the market price?

A Well, that calls for a legal conclusion. I guess I would tend to hope that it is.

Q What was your conclusion in this resolution that you drafted?

A I believe the resolution refers to the market price on the New York Stock Exchange.

Q In the case of the indenture computation, on the other hand, the next step was "the market value thereof," was it not?

MR. GILLESPIE: Your Honor, might I suggest that the witness be furnished with a copy of this resolution that he has been questioned about?

THE COURT: I don't know what he is reading from. I don't know what you are reading from. Are you reading from A 10 or are you reading from the minutes that you marked in evidence as Trial Exhibit No. 5? I don't see these figures in Trial Exhibit 5 at all.

MR. WECHSLER: We are not quoting from the indenture, not from either of the other two items.

THE COURT: Why don't you say what you are reading

from? I thought you were reading from the rules on this indenture. Didn't we have that in evidence and didn't we read this thing? Didn't we read this yesterday? I asked you that question before and you didn't pay a bit of heed to my question.

MR. WECHSLER: Can the question be read back, please?

THE COURT: No, go ahead with another question, please. Hereafter refer to what you are reading.

MR. WECHSLER: The question refers exactly to that, and that is why I suggested it be read back.

THE COURT: I want it propounded anew, because at this point we are all confused, at least I am.

When I asked you whether or not we had this yesterday you didn't answer my query, Mr. Fleisher. I recall distinctly that we read this part of the indenture yesterday afternoon. It was on Exhibit 4, wasn't it? I think it is Exhibit 4.

MR. GILLESPIE: That is correct, your Honor, Page 17 and Page 35.

THE COURT: You can concentrate more attention on it than I can. I have one or two other matters on my mind.

It may help you, counsel, so here are my notes on it yesterday. I underscored what was read. This may help you.

It might be helpful to you if you looked at it.

Q You were proceeding in the resolution from market --

THE COURT: Mr. Fleisher, I am accustomed to having members of the bar, when I address them, respond.

MR. WECHSLER: I didn't hear you, your Honor.

THE COURT: Apparently you hear me at times, and when you don't want to hear me you don't hear me, and you ignore me. I am not accustomed to be ignored by counsel.

Go ahead.

MR. WECHSLER: My name is Wechsler, your Honor. That is perhaps why I didn't hear you.

THE COURT: I called you Fleisher, because Mr. Fleisher is a very dear friend of mine, whom I admire very much.

MR. WECHSLER: I don't resent it.

THE COURT: So you should feel complimented.

Q You were proceeding in the resolution from market price to determine the fair value of "such shares," which were the dividend shares or the stock dividend shares, and with respect to the indenture from market value of the shares in the other; isn't that so?

A Yes, the resolution was designed to reflect the accounting treatment adopted by the company, approved by its auditors, followed consistently in prior years as to the

transfer of earnings from the earnings account to the capital account. My opinion as to whether or not there should be an adjustment in the conversion rate was my opinion based on the precise language of the indenture, which is quite different.

There was no indenture, there was no document to be construed with respect to the question of how the resolution was to be written. The resolution was written to reflect the accounting practices of the company.

I am not sure that is responsive to your question, but I think it should help clear up the problem that you are obviously having.

Q In 1959 did you find out the prior practice of the company with respect to calculating any adjustment in the conversion ratio under the indenture?

MR. GILLESPIE: Could I have the question read back. I couldn't understand it.

THE WITNESS: I'm not sure I do either.

THE COURT: Yes. The reporter may read it.

(Question read.)

A I was not aware of any prior practice of the company on this point.

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Q The resolution which you have before you says "fair value" of such shares is to be determined by adjusting the market price to the new number of shares. In the indenture it says "market value thereof," the same shares, is to be determined - the same word - as provided in Section 1.01.

Does the word "determined" mean that something has to be done to find "the market value thereof"?

A I don't believe so. In my opinion the indenture is fairly clear. It refers to the closing price of the capital stock of the company on the New York Stock Exchange on the date of declaration of the dividend.

Q If the "market value" were the same as "market price," would the market value have to be determined?

A Well, someone has to at least inquire and determine what the closing price on the New York Stock Exchange was.

Q Is that what you meant by determining something in the resolution?

MR. GILLESPIE: Your Honor, I object to this whole line of questioning. In the first place, they don't have the resolution in front of the witness, and they are asking him questions with regard to that.

In the second place, the indenture is precisely clear on this point. It says the value shall be the market

price, the close on the New York Stock Exchange on the date the dividend was declared. I don't know why we are going around and around with regard to this.

THE COURT: In the first place, we have been over this yesterday, particularly with respect to the item of limited stock dividend and the definition of market value.

I suggest you go to something else.

BY MR. WECHSLER:

Q Were you not, in fact, giving Boeing the opinion it wanted to have in that resolution?

MR. GILLESPIE: Your Honor, I don't know what the meaning of that question is. If it is --

THE COURT: It means was he giving a false opinion just to satisfy his clients, in plain words.

A Absolutely no.

THE COURT: Why don't you put it in plain, blunt language so we will understand?

Do you charge Mr. Olsen with fraud too?

MR. WECHSLER: I am not making charges, your Honor.

Q Isn't it a fact that by your interpretation --

THE COURT: If you are not making charges you should not ask a question like that. It is improper examination even of an adverse witness. You are bound by certain ethical rules, counsellor, in your examination of a witness.

All right, next question.

Q Isn't it a fact that by your interpretation you increased the so-called consideration received by Boeing by 700,000, from approximately 19,800,000 to approximately 20,500,000?

A I didn't increase anything, Mr. Wechsler. I gave my honest opinion as to what I thought was the proper interpretation of the language of the indenture.

My opinion as to the interpretation of the indenture has nothing whatsoever to do with the accounting practices followed by the company in determining the amount of earnings that were to be capitalized.

THE COURT: The Court so rules as a matter of law. The conversion rate is set by the indenture itself, period, particularly in these days when you have problems of accounting and how capital items should be treated. They are treated one way for income tax purposes; another for accelerated depreciation; another way according to actual life. One agency or one branch of the Government wants it handled one way and another, another way. The income tax people take figures on accelerated depreciation; the Public Service Commission and other utilities want it handled on actual life. That is only one aspect of the whole picture, one of many aspects.

BY MR. WECHSLER:

Q Did your interpretion affect the company's calculation of the conversion rate?

A I assume the company's calculation of the conversion rate was based on my opinion, or, at least, I hope my opinion was taken into account in any calculations that the company made.

Q According to Paragraph 103 of the stipulation of facts, the call of debentures was discussed at a meeting of Messrs. Haynes, Thornton and Olsen on February 24, 1966.

Mr. Haynes testified here that he recalled no discussion --

THE COURT: What are you reading from now, counsellor? We went into this meeting of the 24th yesterday. I thought we had covered this.

MR. WECHSLER: I am reading from Mr. Winer's questions, and I am not reading from any particular document. I am reciting Mr. Winer's understanding --

THE COURT: You just ask a question, counsellor. I thought we had covered this meeting.

MR. WECHSLER: Well, I have to begin the question again.

THE COURT: No, just frame your questions properly. I asked you to do that at the beginning of today's session.

Q Did you suggest on February 24, 1966, that the

conversion rights of the debenture holders might interfere with issuing any more stock option shares free of pre-emptive rights?

A No, sir.

Q Was it a fact --

A I am sorry. Did you ask a question?

Q Was it a fact that the conversion rights of the debenture holders might interfere with issuing any more stock option shares free of pre-emptive rights?

A I don't believe so. No, absolutely not.

Q Was it not on that same day that you suggested increasing the number of shares available for stock options for officers and employees?

A Yes, I believe that is correct.

I think I should explain why the certificate of incorporation of the company authorized a specified number of shares to be free from pre-emptive rights for issuance for stock option, employees stock option, stock purchase incentive plans.

The certificate has last been amended some number of years ago. The number of shares remaining was not very large, and it was necessary to get approval of the stock-holders for the issuance of any more shares under incentive or stock option plans to officers.

One of the items that were discussed on the 24th was amendment of the certificate of incorporation to increase the authorized capital stock of the company sc that additional stock could be issued in the upcoming financing program, and my recommendation was that as long as the certificate of incorporation was going to be amended, or a proposal to amend it was going to be submitted to the stockholders, that it should be accompanied by a proposal to increase the number of shares that could be issued under the certificate for officers' incentive plans. It had nothing whatsoever to do with the number of shares that were reserved or available for issuance upon the exercise of conversion rights of debenture holders.

THE COURT: This conference, gentlemen, should have taken place before the court session began. You are imposing on the Court with these unnecessary delays.

Next question.

Q Did the restrictions in the indenture prohibit increasing the number of shares distributed free of preemptive rights after the 350,000 excluded shares were issued?

A No, sir.

MR. WECHSLER: No further questions.

THE COURT: You have no questions, have you, Mr. Gillespie?

MR. GILLESPIE: No further questions.

THE COURT: All right.

Thank you, sir. You are excused.

(Witness excused.)

THE COURT: Next witness.

MR. WINER: If your Honor please, I believe that it would be advisable to put some things in the record which do not affect the next witness.

Perhaps we can do it by concession?

Would it be conceded that Joanne W. Finn is still the owner of $3,000 worth of debentures and that these have not been redeemed or converted?

MR. GILLESPIE: We have no way of knowing at the moment, Mr. Winer.

MR. WINER: I will take the stand --

MR. GILLESPIE: Subject to correction I think we would be prepared to do so.

THE COURT: Is the lady here?

MR. WINER: No, sir, she is my daughter, and I have the bonds, and I will so testify.

THE COURT: Are they negotiable bonds?

MR. WINER: Yes, sir.

THE COURT: Show them to Mr. Gillespie.

MR. WINER: They are in my vault. I will go

get them.

MR. GILLESPIE: Your Honor, we will accept the stipulation subject to Mr. Winer showing those to us. No question about that.

THE COURT: Are they coupon bonds?

MR. WINER: They are coupon bonds. They are part of this regular issue which is in dispute here.

Next I should like to offer in evidence, your Honor, the capital stock history of Boeing. I am sure you have copies. You furnished it to me.

MR. GILLESPIE: No objection.

THE COURT: Received in evidence.

MR. WINER: Your Honor, on Page 1 of this exhibit ---

THE COURT: First mark it in evidence.

xxxxx (Marked Plaintiffs' Trial Exhibit 6 in evidence.)

THE COURT: Now describe what it is, Mr. Winer.

MR. WINER: Yes, sir.

I would like to read to your Honor --

THE COURT: Just tell me what it is, please.

MR. WINER: This is a history of the capital stock issued by Boeing from July 1, 1958 to May 1, 1966. It gives the number of shares issued.

THE COURT: That is a new stock issued during those years?

MR. WINER: Well, it starts with a balance of the old stock issued. It carried forward.

THE COURT: Let me look at it. It is quite simple. You don't have to explain it to me.

MR. WINER: May I call your Honor's attention --

THE COURT: Please don't call my attention to anything yet. I can look at it.

MR. GILLESPIE: This is a clearer copy, your Honor (handing).

THE COURT: All right.

You have the tabulation here of the amount in dollars and cents.

MR. WINER: Does your Honor wish me or will your Honor allow me to call your attention to two comments on the exhibit or not?

THE COURT: Sure you can.

MR. WINER: The top of Page 1 of the exhibit refers to the 4 percent stock dividend of November 4, 1958, as follows: "Amount transferred from retained earnings - November 4, 1958 market price of $56.875, divided by 1.04 equals 54.75."

And on Page 2 of the exhibit I call your attention to the amount transferred from retained earnings alongside the 2 percent stock dividend of November 2, 1959, and it

continues, November 2nd market price of $30.375 divided by 1.02, equals 29.875.

Now I should like to read into the record --

THE COURT: Just a moment.

You just read from Page 3, didn't you, of this exhibit?

MR. WINER: On the exhibit it is Pages 1 and 2.

Your Honor has a copy which may be differently arranged. It is marked Page 3, yes.

THE COURT: Will you let me see that, because it does not appear clearly on my copy.

Let me see yours.

I see it. They are not lined up. They are not exactly lined up.

MR. WINER: Now, your Honor, certain stock prices are going to be relevant in the questions put to the expert by me, and I should like to read these into the record. That would be easier than from the Wall Street Journal, copies of which I have here.

THE COURT: Wait a minute. Have you made a tabulation of this?

I think in one of these exhibits we have this spelled out, don't we, in your requests to admit? Don't you give the daily prices at material times?

MR. WINER: This period is not covered, your Honor.

MR. GILLESPIE: In this period it is not covered, your Honor.

THE COURT: Why don't you introduce it in evidence?

MR. WINER: It is in the form of one of the letters, your Honor, which has been agreed to by the other side. I think if I just read in just a few prices and dates, it will be simpler.

THE COURT: All right, it is stipulated, then, that what he is reading is an additional set of facts?

MR. GILLESPIE: Right, subject to correction, I take it?

THE COURT: Subject to his corrections?

MR. GILLESPIE: Well, I will check it.

THE COURT: All right, subject to errors and omissions.

MR. WINER: It is my understanding it has been checke and rechecked by defendant.

"The date of the declaration of a 2 percent stock dividend in 1956 was October 26th. The closing price of Boeing stock on the New York Stock Exchange on October 26, 1956, was 53-3/4. The date of declaration of a 4 percent

stock dividend in 1957 was November 5th. The market was closed on November 5, 1957. The closing price of November 4, 1957, was 34-7/8. The 4 percent stock dividend of 1958 declared on November 4, 1958, went ex dividend on November 14, 1958, together with a 25 cent cash dividend.

"The closing price of Boeing on the New York Stock Exchange on November 13, 1958, was 54-1/8. The closing price on November 14, 1958, was 51-1/4."

THE COURT: What significance do you want me to attach to this? I don't get it. You are giving me dates which are prior to the indenture in suit. The indenture in suit is a 1958 indenture, isn't it?

MR. WINER: Yes.

THE COURT: You are giving me dates before that. For what reason?

MR. WINER: To show the practice of the corporation in dividing by 1.02 and 1.04, and transferring from retained earnings to capital. That is the purpose.

THE COURT: To show that this was an accounting practice of the Boeing Company?

MR. WINER: Right.

THE COURT: Which you claim they didn't follow when they called these debentures in suit?

MR. WINER: That is right. They did not follow

with respect to the conversion rate, yes.

Now, finally, The Wall Street Journal and The New York Times reported on November 15, 1958, that the net change in the closing price of Beeing on November 14, 1958, was minus 1/2.

May I correct the date of the declaration of the November 1958 divident from November 4th to November 3rd.

Now, does your Honor wish me to call a witness?

I will call Mr. Pivar.

THE COURT: Yes.

MR. WINER: Mr. Pivar, will you take the stand, please.

S A M U E L P I V A R, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WINER:

Q Mr. Pivar, what is your profession?

A I am a certified public accountant.

Q Would you please give us a brief resume of your personal, academic and professional background, a general description of your firm and your specialization and experience in the firm, and any relevant information in addition with respect to your professional life?

A I am a graduate of Pace Institute, which is now Pace College, in 1933; I have been with the firm of Seidman & Seidman, which is a national firm of certified public accountants, since 1941. I have been in that firm the national director of its accounting and auditing practice and the national director of its SEC practice.

I am a member of the executive committee of the auditing standards division of the American Institute of Certified Public Accounts, and Chairman of the Accounting Principles Committee of the New York State Society of Certified Public Accountants.

Q Have you at my request familiarized yourself with various date which I have gigen to you bearing on the stock dividends declared by Boeing Airplane Company in 1958 and 1959, and bearing on the acquisition of the Vertol Aircraft Company in 1960?

A Yes.

Q Now, have you at my request made certain arithmetical computations or calculations?

A I have had someone make them for me, someone on my firm staff, and explained them to me, and I am satisfied with them.

Q Have you ever calculated how many dollars 281,537 shares at 54.69 would be?

A May I look at the memorandum I have of those calculations?

Q I am sure his Honor would expect you to.

A 281,537 shares at what price, sir?

Q At 54.69.

A Yes, I did.

Q And what is that number, sir?

A $15,397,259.

THE COURT: $15,397,259?

THE WITNESS: Yes, sir.

Q Have you made the same calculation with respect to 147,489 shares at $29.07 a share?

A Yes.

Q And what is that total?

A $4,390,748.

Q Have you calculated what 448,934 shares at 33-5/8 comes to?

A Yes.

Q $15,096,078.

Q Now, have you calculated what the sum of $15,250,000 divided by 448,954 shares gives you as the price for each share?

A Yes. Would you state the question again? I think I lost a figure.

MR. WINER: Perhaps it would be better to read it.

THE WITNESS: I meant to reread it. There is one of those numbers that did not catch my ear.

(Question read.)

A Yes. And the amount is $33.968 rounded very slightly.

Q Have you calculated what difference it makes in dollars if you multiply the 448,954 shares by 33.968 as against multiplying that number of shares by 33-5/8?

A Yes.

Q What is that difference?

A Multiplying it by 33 and -- well, by $33.968 results in $153,922 more than at $33-5/8.

Q Have you calculated how many dollars 448,954 shares at 30-5/8 are?

A Yes.

Q What is that sum?

A $13,749,216.

Q And, finally, have you calculated what 448,954 shares

at $24 a share comes to?

A Yes.

Q And what is that?

A $10,774,896.

Q Would you please state to the Court what the functions are of a corporation's accountants in computations, book entries, annual reports, and any other records of the corporation in connection with stock dividends where the corporation has no outstanding convertible securities?

A The usual procedure is to read the minutes of the corporation in which the dividend declaration is contained to compare the entries recorded in the accounts with the declarations and to compare the data which entered into the computation of the amount transferred from retained earnings, or whatever the accounting might happen to be with the appropriate source data. Then to see that the recording in the accounts is in accordance with generally accepted accounting principles; that the reporting of the stock dividend on the company's financial statements is appropriate.

The procedures would also usually include a determination that after the stock dividend shares have been issued the total number of shares outstanding is confirmed to us by the transfer agent or registrar or both.

That is about generally the range of it. There may

be some other detailed procedures in certain cases.

Q Would you please state to the Court what functions the accountant performs in connection with acquisitions and mergers where there are no outstanding convertible securities?

A Well, the procedures would include the reading of the minutes authorizing the acquisition. They would include the reading of the agreements pertaining to the acquisition, the review of the accounting, recording in the accounts of the acquisition, and whether the recording was in accordance with the generally accepted accounting principles and whether the recording on the financial statement of the company was also in accordance with generally accepted accounting principles.

We would also make inquiry as to whether the acquisition or the terms of it or the result of it in any way had any effect on any outstanding contractual commitments or restrictive covenants to which the company might be a party to see what effect they might have on the accounting.

Q Would you please assume that a corporation has issued convertible securities and that the underlying indenture or the certificate of incorporation contains an anti-dilution clause --

THE COURT: That is two questions in one.

MR. WINDER: Do you want me to leave out the certificate of incorporation?

THE COURT: I want you to ask one question at a time. I don't know what relevance the certificate of incorporation has here.

MR. WINER: The relevance of a certificate of incorporation is that if the convertible securities or stock or preferred stock, then the --

THE COURT: You can assume that I used to be a lawyer before I became a Judge. What is its relevance with this case?

MR. WINER: None, just the general procedure.

Q Please assume that the corporation has issued convertible debentures and that the indenture contains an underlying anti-dilution clause.

Would you tell the Court generally the significance of such a clause in relation to a stock dividend or acquisition or merger in connection with the accounting duties which you would have?

THE COURT: I don't think that is a proper question. We are concerned with the indenture in this agreement or in this corporation on these convertible debentures. I assume that this man, having received his training from one of the oldest accounting schools in the country, particularly in this

state, because when he went to Pace there was only one other school, and that was Brokau and NYU had not even begun to start, even though they had little parttime classes at night down on Wall Street in the Stock Exchange -- I assume that he went and looked at this indenture agreement.

Why don't you, instead of asking these hypothetical qurstions, come down and put to this witness the facts in this case as he knows them.

Ask him: Have you looked at the indenture? Have you looked at the statements, the minutes? Have you examined these minutes?

MR. WINER: I expect to come to all of that.

THE COURT: Do it right away. It is better. You have an intelligent, experienced, trained, well-educated accountant on the stand. He comes from a very reputable firm. He would not express an opinion unless he made certain research.

Forget this hypothetical business. Let us come down to the facts in this case. We are not trying a murder case or a homicide case.

MR. WINER: I simply want to say that I have been trying to get before the Court what the accountant's duties are generally.

THE COURT: You can ask him that generally.

MR. WINER: I am trying to.

Q What are the accountant's duties generally when there is an outstanding issue of convertible debentures -- what are the duties of the accountants, so far as this indenture is concerned, so far --

THE COURT: Please, maybe I will help you. Maybe I won't. You might not think it.

When an accountant is employed by a corporation such as Boeing, a large corporation, and they have outstanding convertible debentures and they declare a stock dividend, there comes a problem as to how that stock dividend shall be treated with reference to the conversion price of the debentures, does there not?

THE WITNESS: Usually.

THE COURT: All right. What, according to all the recognized accounting practices and procedures, are the duties of an accountant who is called in -- say he is an outside independent account -- to examine the effect of the stock dividend upon the conversion price of the debentures? What would you expect him to do and what would you do if you were called in on that?

THE WITNESS: Having satisfied myself with respect to the accounting along the lines that I have described in response to the previous question, I would also make reference

a nd read the applicable portions of the indenture. These usually relate to anti-dilution, but there may happen to be some others, and reach a conclusion if I could, as to whether or what effect the stock dividend would have had on the conversion rate or other aspects of the --

THE COURT: And how it should be treated in computing the conversion rate?

THE WITNESS: Yes, that is what I mean by what effect it would have.

THE COURT: All right.

Q Now, please assume the following facts:

On October 26, 1956, Boeing declared a 2 percent stock dividend, which required the issuance of 130,072 shares and an appropriate transfer from surplus to capital. Assume that the sum transferred was determined by taking the closing price on the New York Stock Exchange on the date of declaration, namely, 53-3/4, dividing that by 1.02, which resulted in a figure of 52.70; that that sum was rounded off to 52-3/4, and that the resulting multiplication of 52-3/4 by the number of shares in the stock dividend totaled 6,895,454, and that was the sum transferred.

Assume that on November 5, 1957, Boeing declared a 4 percent stock dividend which required the issuance of 267,445-1/2 shares, and an appropriate transfer from surplus

to capital. The New York Stock Exchange was closed on that date. The sum transferred was determined by taking the closing price on November 4, 1957, namely, 34-7/8, dividing that by 1.04, which resulted in a figure of 33-1/2, and that multiplied by the number of shares issued came to 8,959,424, and that was the sum transferred.

Assume that on NOvember 3, 1958, Boeing declared a stock dividend of 4 percent. The stock closed on the New York Stock Exchange that day at 56-7/8. In computing the sum to be transferred from surplus to capital Boeing divided that price by 1.04, and rounded off the figure at 54.75, multiplied that price by the 281,537 shares so issued and transferred, resulting $15,414,150 from surplus to capital.

Assume that on NOvember 2, 1959, Boeing declared a 2 percent stock dividend. It took the closing price of that day, namely, 30-3/8, divided that sum by 1.02, rounded out that result to 29-7/8, and multiplied that sum by the number of shares so issued, namely, 147,489, and transferred the resulting sum of $4,406,233 from surplus to capital.

Have you an opinion which you can express with reasonable certainty as to whether this procedure was in accordance with proper accounting practices?

A I have an opinion.

Q What is your opinion?

A I believe that is an acceptable accounting practice.

Q Please assume the facts asserted in the preceding hypothetical question and also the following:

Between the dates of the 1956 and 1957 stock dividends on one hand, and the dates of the 1958 and 1959 stock dividends on the other,Boeing on July 15, 1958, issued the 4-1/2 percent convertible debentures of 1980.

The underlying indenture, which I shall assume that you have read, unless you state to the contrary, is agreed Exhibit 4 in this case.

Now, have you an opinion which you can express with reasonable certainty as to proper procedure by the auditing accountant with respect to computations under the indenture in view of the use of the market price on the date of declaration divided by 1.02 for 2 percent dividends and 1.04 for 4 percent stock dividends for purposes of transfer from surplus to capital and the use of the market price in full on the date of declaration for computations under that indenture.

MR. GILLESPIE: Your Honor, I don't understand that question.

THE COURT: If the witness doesn't understand it he may say so, and if that is your objection -- I don't think it is an objection -- but make a note of it for cross-examina-

tion. If the witness understands it, he may be smarter than both you and I together.

THE WITNESS: Well, I think I know what --

THE COURT: No, no. I don't want you to guess. I want you to take the question that has been put to you. Can you understand that question and give an answer as an expert accountant?

THE WITNESS: Yes, sir, I can.

Q Would you give us your opinion?

A Well, in that circumstance I would be governed by these facts:

The company has taken the same shares, the same date, made a determination of value -- two determinations of value, and they are different from each other. I would refer to the indenture with respect to the calculation and determination for that purpose, and if my reading of it left me with some doubt as to whether there was room here for an inconsistency, in that circumstance I would have asked the company to obtain for me a written opinion of its legal counsel, interpreting the provision of the indenture relating to this.

MR. GILLESPIE: Your Honor, having heard the answer of the witness --

THE COURT: The answer is very plain, very concise,

very forward and very impressive.

MR. GILLESPIE: Right, your Honor.

THE COURT: He would apply the terms of the indenture to the definitions of the indenture. If he didn't understand them or found them to be ambiguous he would want an opinion of counsel.

MR. GILLESPIE: I think he stated that he did find them ambiguous. If that is the testimony, I move to strike ---

THE COURT: You move to strike out his conclusion about them being ambiguous?

MR. GILLESPIE: That is correct, your Honor.

THE COURT: With that we are not concerned. I understood him to say if he found them ambiguous he would get the opinion of counsel, or he said if he was doubtful. I think that was his way of saying it.

MR. GILLESPIE: If he said if he was doubtful, then I have no motion.

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THE COURT: I thought he did.

Did you use the term "if I were doubtful"?

THE WITNESS: I meant to. I'm not sure exactly how it came out.

MR. GILLESPIE: Then I have no motion.

Q Mr. Pivar, you stated that you would have asked

for an written opinion of counsel.

THE COURT: Did he say written? I don't know. An opinion of counsel.

THE WITNESS: I think I said written.

THE COURT: You wouldn't want it given to you, you simply want an opinion of counsel in the record.

THE WITNESS: It is usually sent to us, or at least a copy is sent to us.

THE COURT: Then in your audit you would make reference to this opinion of counsel perhaps?

THE WITNESS: I might and I might not, your Honor.

THE COURT: Perhaps if you were making a certification, wouldn't you make reference to it? Sometimes you put in the opinion as an exhibit or refer to it specifically?

THE WITNESS: It would be in my work papers. Whether it would go into the financial statements or reference would be made to it in the financial statements is something I couldn't answer categorically. I think it would depend upon the circumstances.

THE COURT: If we are dealing in a stock that was publicly traded and publicly owned --

THE WITNESS: No, your Honor.

THE COURT: -- would you put it in as a footnote,

an explanatory footnote?

THE WITNESS: No, the fact that there was a legal opinion, unless I thought it was significant to the determination -- it might or might not have been.

Q Assume that the anti-dilution provisions of this indenture required determination of fair value of acquisition. Are there established criteria for determining the fair value of a purchase for accounting purposes?

A Yes.

Q Would you state to the Court what those criteria are?

A For accounting purposes the fair value in a purchase acquisition where stock is given as the consideration, it is usually the value of the stock that is given, or the value of the property received, whichever is the more clearly evidenced. When the transaction is for stock of the acquiring company, that stock is a traded security. The usual practical approach is found to be, and one that is usually followed, is to take the market price of the stock of the issuing company as representative of the fair value, because that is usually easier to determine than the value of property received.

THE COURT: Are you limiting your valuation solely to the physical and tangible assets?

THE WITNESS: No.

MR. GILLESPIE: Your Honor, I didn't hear the complete question. I'm sorry.

THE COURT: Are you limiting your opinion only and solely to the physical or tangible assets?

THE WITNESS: No, sir, your Honor, to the entire. When I said property I meant the company that is being acquired in its entirety.

THE COURT: That would include its trade name, its reputation, its organization, its know-how?

THE WITNESS: Whatever is being acquired in exchange for this.

THE COURT: What if they are acquiring the whole company?

THE WITNESS: Yes.

THE COURT: What I would like to know is would you include in your evaluation of that acquisition a price over and above the physical, tangible assets which might be represented either by goodwill, trademarks, trade name, or know-how, or an organizational setup of employees, experienced employees in a special field?

MR. WINER: May I ask your Honor if you are referring to the calculation of the stock price and --

THE COURT: Do you object to the question?

MR. WINER: I object to the question.

THE COURT: The objection is overruled.

Will you read the question slowly to the witness.

(Question read.)

A I would limit myself to the amount that the company, the acquiring company, has paid for it. I wouldn't go beyond that.

THE COURT: The actual amount that was paid for it?

THE WITNESS: Yes.

THE COURT: That would include these other elements that I mentioned?

THE WITNESS: It might.

MR. WINER: I object to the question.

THE COURT: The objection is overruled.

MR. WINER: I don't think there is any relation between the price of the stock and --

THE COURT: Except that you had the testimony of the former president and chairman of the board. He said that when they took over the stock, they took it over because they were experienced in a special field and in a special sphere of aviation which had never engaged the attention of Boeing before, and they wanted to find out something about it and get an organizational setup and management and know-how so that they wouldn't lose time and wouldn't make costly